

# **Personhood, Collective Intention and Corporate Moral Responsibility**

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A thesis submitted for the degree of PhD in Philosophy

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Submitted July 2019

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## **Abstract**

This study in applied ethics addresses whether the ontology of corporations as rights-bearing artificial legal persons allows them to be held morally responsible as unitary entities and members of the moral community, or if their status requires ascription of moral responsibility to reduce to their individual participants. I argue that moral responsibility is ascribable to corporations not on the basis of their agency as metaphysical natural persons but as irreducible non-agential intentional systems. The moral issue is illustrated through a case study of the global financial crisis of 2007-08.

Legal personhood is essential for understanding corporations because they are legally constructed, not natural. Personhood is fundamental for corporate accumulation of constitutional rights in US law. However, the dominant aggregation legal theory treats corporations as non-entity fictions reducible to only their participants. While the law suffers theoretical indeterminacy about responsibility, corporations act collectively and intentionally. There are two views of corporate collective intention: 'state-of-mind' (SoM) and 'course-of- action' (CoA). SoM requires that the nature of collective agents sufficiently conform to a natural agent for ascription of responsibility. CoA concerns itself with what the entity plans and executes and its consequences, even if it is an intentional system. I argue CoA of intentional systems resolves problems of corporate moral responsibility because they are conversable members of the moral community.

I conclude we may assign moral responsibility to corporations as unitary non-agential intentional systems, and not only to individual participants. The metaphysical question of the ontology of corporations need not be resolved because as collective, juristic intentional systems we can assign moral responsibility to them despite their not having intentional states of mind or agency. To preserve financial stability and democratic processes financial sector corporations must be susceptible to legal, social and moral responsibility.

## **Acknowledgements**

The question of corporate behavior has been with me for a very long time—since childhood, always in the background, sometimes hidden under other events and the busyness of everyday life. But there has been a persistence to it, and this question has endured for me because its roots are actually in the Great Depression and the financial sector companies that caused the crash of 1929, the crisis that followed and then led to World War II. I am, as it were, a child once removed of the Great Depression. That crisis was a living constant as I grew up and went to school. Almost every day, in some way or another, I would hear the causes and consequences of the Great Depression put as a lesson, a warning and a moral tale. Such is the long tail of financial sector corporate action.

When I came to this PhD project I came to pursue an answer to a question issuing from my childhood experience. I did not come to become an academic philosopher, nor did I come for reasons of career or for self-advancement. I came to find understanding and to work toward an answer to my question: how do corporations, with seeming impunity, get away with the harmful things they do? Since then, question has evolved: how can corporations expect not to encounter stringent demands that they shoulder moral obligations for what they cause to happen? As it appears they don't, is it possible to make an argument that they ought to?

When I began to more seriously consider this as a soluble issue—as a puzzle of social, moral, economic and political life—I was further motivated by what I witnessed while working as a technology manager in a corporate law firm in San Francisco just as the new microcomputer was taken up by law firms. As a new and promising tool for those in the legal arena who made their living producing words and arguments I was on the front lines implementing personal computers for legal work. In the San Francisco Bay Area, and in what was to become Silicon Valley, some burgeoning technology companies were already making vast amounts of money selling personal computer products of inferior quality, but managing to mostly escape responsibility when those

products either failed to work or demanded superhuman effort from support staff to make them work productively.

I casually discussed my question with lawyers I worked with and they told me my question was one of morals and ethics, and not only an issue in corporate law, as if these were entirely separate things. I swiftly learned that in the United States corporations have power because they have certain rights under the US Constitution. They get those rights and consequently various kinds of power because they are treated as a special kind of abstract thing—legal persons. The lawyers I spoke with suggested that I talk to philosophers about the issues. Ironically, not too long after I started this project as a PhD student, some of the philosophers I encountered sent me to talk to lawyers. In the ensuing process of navigating the waters of the two worlds, details quickly began to appear in what had been a largely amorphous and fog-bound muddle.

Given the long voyage from the beginning to the end of this project I owe immeasurable debts to a great number of people. It is they that have enabled this project to come to successful fruition. All of the deficiencies, shortfalls and errors are mine alone.

There have been so many people that have contributed in one way or another to this project that it is not possible to acknowledge them all. The gratitude I owe them is something must not go unrecognized.

First, I must thank the people of the NHS without whose skilled care and treatment I would not be enjoying the completion of this thesis or anything else.

I would especially like to thank too all the teachers from whom I have had the privilege to learn and whose efforts were not always fully understood at the time.

The teaching staff at Essex have been exceptional and the collegiality and support they have shown me made my journey here unforgettable and enriching in too many ways to count. Matt Burch,

Peter Dews, Beatrice Han-Pile, Timo Jütten, Sheldon Leader, Lorna Finlayson-Wheeler, Fabian Freyenhagen, Wayne Martin, Irene McMullin, David McNeill, Jörg Schaub and Dan Watts have each made a unique contribution to my experience and enlightenment. I also wish to acknowledge Christopher Cowley for helpful criticism, comments and suggestions. To all of you I say thank you.

I would also like to thank the administrative staff of the Department of Philosophy for the support and guidance they have provided as I made my way through some very difficult periods on the way to completing this project. I especially want to thank Hannah Whiting, Barbara Crawshaw, Wendy Williams and Karen Shields all of whom have made more than a few extra efforts and contributions to seeing that I was able to keep on when it did not seem possible.

Will Cartwright has been more patient and supportive than I could have had a right to expect. For his pastoral care, tutoring, tuition and support in some troubled times I am deeply appreciative. I could not have had a better supervisor for my passage through a long series of waves and troughs of steering this project to fulfilment. Through all the starting and stopping, diversions and distractions Will remained quietly supportive and helped me stay on the path in spite of my proclivity to explore every imaginable detour along the way. Those long supervisions were a test, but of the best kind.

To my wife Libby, I can only say thank you. For all you have done, in good times and bad, and particularly in those days when things looked very dark indeed, you made this possible. Without you this project could not and would not have happened. You listened to my concerns and worries for far too many years during the gestation and realization of this thesis and I am grateful you challenged me to keep pushing, not too hard and never to quit.

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## CHAPTER 1-INTRODUCTION

### Introduction

In the late summer of 2007, while people around the world were enjoying their annual holidays, slowly and almost silently a devastating but avoidable global financial crisis (GFC) had begun to erupt.<sup>1</sup> In its wake, this crisis brought the worst and longest-lasting socio-economic destruction and instability since the Great Depression of the 1930s. More than ten years after its onset, the full effects have yet to completely materialize. However, the people and institutions that caused this crisis have gone unpunished in any meaningful way. Indeed, they have not been substantively held to account for the consequences of what they intentionally did and no top officials or senior managers have been charged, sentenced or punished for the harms that followed. The conditions that gave rise to the crisis, which is not yet ended, unsurprisingly began to reappear just over ten years later.

The purpose of this thesis is to explore whether it is possible to assign moral responsibility to corporations, and if so, how might that be done.<sup>2</sup> There are two arguments for the necessity of assigning moral responsibility to corporations. First, legal redress is insufficient because of legal exemptions and protections that corporations have secured based on their standing as legal fictions (as well as the scale of harms made possible by globalized corporations).<sup>3</sup> Second, the current

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<sup>1</sup>In this study I will refer to the acute global financial crisis of 2007-2009, and the chronically persistent period of economic and financial distress and instability since then, as the GFC.

<sup>2</sup>My definition of moral responsibility follows Eshleman in his 2016 Stanford Encyclopedia of Philosophy article (Eshleman 2016, pp. 10–13). Eshleman describes P. F. Strawson's merit-based responsibility argument in which it is the actions of others that reflect their positive or negative attitudes towards us in what they do that affects us for good or ill. Strawson calls these participant reactive attitudes because they are natural attitudinal reactions to someone's attitude to us (Strawson 1962). The attitudes we express (resentment, love, anger, forgiveness) are those issuing from our immersion in an interpersonal relationship and regard the person acting towards us as a participant in the relationship too. We do not need external excuses even if another's actions are determined to hold people responsible. When we hold people responsible we do so on the basis of what they have done, how they have merited our praise or blame based on what we demand of them.

<sup>3</sup>A legal fiction as I use it in this thesis is an assumption or an assertion that something that is not true, is true (as a fact), and gives to that person or a thing a quality that is not natural to the person or thing. It thereby establishes a



philosophical debate is mired in arguments about the ontology of corporations that have not yielded a clear philosophical grounding for assigning responsibility to corporations.<sup>4</sup> This thesis argues how the legal barriers and philosophical stalemate can largely be traced to the influence of neoliberal thought and by doing so that it is necessary to make this moral assignment of responsibility, and that it is possible to do so by defining corporations as non-agential intentional systems. That is, I will argue for corporate moral responsibility by looking at what corporations do, not what they are.

In this thesis, the GFC will be used to illustrate selective points, in particular, the breadth and severity of harms possible by widescale corporate wrongdoing. (Details of the crisis, while useful, are not essential for the philosophical argument and can be found in the Appendix.) The financial crisis that began in August 2007 may have led to the greatest transfer of wealth in human history. We do not yet know if it is true that the wealth transfer (only partially in the form of bank bail-outs) is the greatest ever because the process is ongoing, and the final tally is incomplete. While there is a growing body of research on the causes and consequences of the GFC there have been few credible research efforts to calculate the costs either in monetary or non-monetary terms.<sup>5</sup>

However, this thesis is a more general exploration in applied normative ethics. The focal problem of corporate moral responsibility in this thesis is not hypothetical. It is an attempt to address actual cases of wrongful action by (what are claimed to be) agents, but it remains controversial to assign moral responsibility to them as agents. The controversy is due to conceptual confusion and theoretical incompleteness as well as political indecision about the true nature of corporations.

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purpose for or a disposition toward that person or thing that otherwise would offend reason and truth.

<sup>4</sup>I understand the ontology of the corporation as the metaphysical reality, essence or nature of a corporation as a collective entity.

<sup>5</sup>In Chapter 5-Responsibility I will briefly document the monetary and other harm ensuing from the GFC. There have been credible empirical attempts to estimate the both the damages and costs that have been already been experienced and those that have yet to be realized.

## Structure of the Study

A sketch briefly describing the structure, organization and content of the succeeding chapters is offered below.

Chapter 2 is concerned with the set of ideas that we know as neoliberalism. Neoliberalism is the theory and the ideology that, I will argue, underlies current problems with ascribing moral responsibility to commercial corporations. Neoliberal theory as a political philosophy rests on a particular set of ideas, and it is the influence of those ideas, and the socio-economic policy consequences that have followed from them that are focal issues of this chapter.

In Chapter 3- Personhood, I discuss the problem of corporate personhood and how personhood relates to the susceptibility of corporations to assignments of moral responsibility. Personhood is the starting point, because personhood is the concept that makes it possible for corporations to claim and exercise rights. The chapter begins with a brief history of legal personhood, and then documents the deficiencies of jurisprudential interpretation and legal application of the concept of personhood. Questions about the assignment of moral responsibility to legal persons as rights-bearing collective agents are specifically examined.<sup>6</sup> The final sections discuss alternatives to personhood-based responsibility.

In Chapter 4-Collective Intention I address philosophical problems of agency of collectives and collective intention<sup>7</sup>, as well as the relationship between collective agents, their deliberate action

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<sup>6</sup>There are two different kinds of groups as collective agents; one is aggregative, an informal, temporary collective, but without decision-making features. The other is corporate (conglomerate) with a formal structure and decision-making capability. A corporate group forms an identity as a group agent through its charter and documents of incorporation. There are two accounts of group agency: one is that the group must have mental states in order to have the capacity for intention. The other argues that for a group to have intention it must engage in group cognition processes. Certain groups are intentional agents and can be held accountable and morally responsible on the basis of their practices of making sense of others. If a collective can be an intentional agent by reason of its practices, Tollefsen argues that in practice the mental states necessary to intentional agency are not internal to the agent, but to the dispositional state of a whole system and not just to a brain or mind.(Tollefsen 2015).

<sup>7</sup>Collective intention is understood through two contending conceptualizations. The two points of view that I distinguish are State-of-Mind and Course-of-Action. A State-of-Mind perspective requires that the nature of a collective agent

and moral responsibility for intentional acts and foreseeable harms. I describe the debate in the literature between (1) those who argue that corporate entities must reduce to their morally addressable individual agents for the corporate action taken and (2) those who hold that corporations can be held responsible as ontological primitives, i.e., as irreducible, responsibility-bearing unitary entities.<sup>8</sup> The debate centers on the requirements of moral agency.<sup>9</sup>

One side maintains that it is impossible to conceive of a corporation as an ontological primitive. Rather, corporations are, they say, things that must reduce to the individuals of which they are composed because only individual human beings are capable of moral agency, and only moral agents can bear moral responsibility. Corporations, because they are legal fictions, do not possess the metaphysical characteristics of natural human beings and thus cannot qualify as moral agents. Because they are not moral agents they cannot bear moral responsibility. In between these two extremes of the debate there is a spectrum of intermediate positions. This enduring disagreement about what moral agency itself demands has not yielded a solution to problem of corporate moral responsibility.

In the final section, I look to the alternative of collective intention. Collective intention is understood theoretically from two points of view. I distinguish these views with the shorthand labels state-of-mind (SoM) and course-of-action (CoA). The former requires that the nature of collective agents sufficiently conform to that of a natural agents' state of mind to permit an ascription of responsibility. The latter (CoA) concerns itself not with the nature of the agent, but what course of action the agent plans and executes and its consequences, even if the agent is an

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sufficiently conform analogously to that of an individual, natural agent to permit a legitimate ascription of responsibility. In a Course-of-Action view ascription of responsibility is concerned not with the nature of the agent, but what course of action the agent plans and executes and the consequences of that action.

<sup>8</sup>I am using the term ontological primitive to describe a primary fact about an entity as something that can neither be reduced to another fact nor can the entity be further reduced to constituent parts.

<sup>9</sup>Moral agency as I am using it refers to an agent understood to have the capacity to act, and that agent is conceived as having the ability or capacity make moral judgments based on an understanding of right and wrong, to be able to give reasons for the action and be held accountable for the action.

intentional system. I also review a spectrum of positions on reductionist and holistic theory of collective intention from leading theoreticians including John Searle, Michael Bratman, Raimo Tuomela and Margaret Gilbert. I argue that the concept of course-of-action of intentional systems offers a way to resolve problems of corporate moral responsibility.

Responsibilities of collective agents are considered in Chapter 5. Agency can be viewed either as reductionist and methodologically individualistic or as collective and methodologically holistic.<sup>10</sup> The question addressed in this chapter is whether with respect to norms of social integration and the common good collective responsibility is owed to individuals and communities by unitary agents even if they are legal fictions or if responsibilities must always rest in an atomistic way on individual real human beings.

I argue that collective entities such as commercial corporations can be part of the moral community.<sup>11</sup> I claim that they belong to the moral community on the basis of several factors essential to the actions they take, the consequences of those actions and their capacity as entities to answer to challenges to give reasons for what they do. That corporations are not sentient does not necessarily exclude them from the moral community. But their ability to form and sustain collective intentions is only partially sufficient to make them susceptible to moral judgements.

I conclude that corporations as legal persons can plausibly be held responsible on the grounds that they are morally addressable and rationally conversable (they can give reasons for what they do) as

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<sup>10</sup>Methodological individualism is the view that groups are reducible to the individual. Methodological holism is, in general terms, the view that groups are not reducible to the individual; groups are understood to have a separate existence from the individuals comprising them (Tollefsen 2015, p. 4).

<sup>11</sup>I am following Shoemaker in defining the moral community: "...our practices in voicing the praise and blame expressive of holding someone morally responsible, in the paradigm case, consist of an interplay between at least two agents, one who addresses a moral demand to the other via the praise or blame and the other who ostensibly hears, understands, and either accepts or rejects the demand, and such an exchange is possible only for those who have the capacity to enter into a certain kind of relationship with one another. Call those who share this capacity, then, moral agents, and call the collection of moral agents a moral community" (Shoemaker 2007, pp. 70–71). See also Darwall, (Darwall 2006, pp. 20–22).

systemic unitary entities.<sup>12</sup> I treat these unitary corporate entities as non-agential intentional systems and on the basis of their systemic characteristics I claim they are susceptible to assignments of moral responsibility.

In this view, corporations are understood as collectives, that is, they can be taken as not reducible to their individual constituents. If the individuals were removed, there would still be something remaining to be made accountable for its actions and to be held responsible for the consequences. Ascriptions of moral responsibility apply not only to natural persons as individual agents, but to these collectives as well. Also on this view, it seems essential that corporations have agency analogous to that of natural persons if they are to be deemed capable of bearing moral responsibility. Those who argue in favor of corporate moral responsibility hold that corporations themselves can bear praise for the good they do as well as blame for the harms they cause because they satisfy the requirements of moral agency. Corporations are, in short, susceptible to blame because they are moral agents, and moral agency is the requisite condition for moral address (Sepinwall 2016). Moral address requires that reasons be given by an agent for what the agent thinks, intends and does. The giving of those reasons demands conversability on the part of an agent or entity.<sup>13</sup>

In Chapter 6 I conclude that it is possible to assign moral responsibility to corporations on the following grounds: the metaphysical question of the ontological nature of corporations need not be resolved because we can assign to them moral responsibility despite their not having intentional states of mind. But, because they are rights-bearing legal constructs with presumed duties and obligations they ought not to do intentional or foreseeable harm in pursuit of their aims. Their

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<sup>12</sup>Moral conversations involve the exchange of moral reasons between those entities in a relationship . The exchange of moral reasons between those in a moral community with the normative capacity for reason-based address and response (conversability) is part of the practice of praising and blaming the eligible party to the exchange (Shoemaker 2007, p. 71). See also Pettit (Pettit 2013).

<sup>13</sup>The requirement of conversability will be developed more extensively in Chapter 5-Responsibility.

purpose is to help solve social and economic problems that cannot be done by individuals. Human beings react to intentional victimization when it is deliberate, selfish and damaging; this is a natural response and provides further grounds for assignment of moral responsibility to corporations but without relying on settling the questions about the ontology of agents, or the use of utilitarianism in holding an entity as morally responsible.

Finally, I report findings and assess the implications of risks for individuals and communities as well as for democracy from politically powerful financial sector corporations. I find that financial sector corporations increasingly no longer fulfil their original purpose as means to socially and democratically useful ends. Although norms of financial sector corporations are not well-understood, in their pursuit of risky practices they have become divorced from human interests and needs, especially with respect to public goods. More frequently they treat individuals and communities as mere means to achieving their own selfish aims and the growing scope of un- or mis-regulated financial sector markets is increasingly and globally dangerous. While no systemic global collapse followed the GFC there are no guarantees with respect to future systemic crises that a collapse would not occur, and it is arguably likely that the result would be much worse than the Great Recession following 2009. Corporations are now so powerful that they act to override or distort democratic control for their own ends. The implications for democratic societies are that corporations must be regulated to protect the common good, to prevent victimisation, and to pursue their original purposes. The standard of moral judgement becomes political (in the sense of belonging to the polis and the political community) as an expression of the social order. This is not a matter of party politics but of the political in the sense of the whole social order and that which holds it together as a coherent and functioning community, one that is interdependent and greater than any of its constituent parts.

## **Chapter 2-What is Wrong (in Theory) with Corporate Moral Responsibility (in Practice?)**

### **Introduction**

This chapter is concerned with the set of ideas that we know as neoliberalism. Neoliberalism is the theory and the ideology that, I will argue, underlies current problems with ascribing moral responsibility to commercial corporations. Neoliberal theory as a political philosophy rests on a particular set of ideas, and it is the influence of those ideas, and the socio-economic policy consequences that have followed from them that are focal issues of this chapter.<sup>14</sup> Collectively, these ideas have formed the dominant socio-economic theory of the economies of the Anglophone nations and most of the rest of the developed world.<sup>15</sup> The socio-economic influences of this collection of ideas were felt world-wide as they have been implemented in a wide range of political policies during the post-WWII period.

Neoliberal theory was intended to promote and insure individual freedom from state control and government tyranny through implementation of a set of economic policies. It has undeniably produced consequences that led to significant positive economic and social development. Equally undeniably neoliberalism has also produced significant and growing negative effects. One of those effects, due to the dominance of neoliberal theory and the economic, political, and social policies, practices and attitudes it has enabled, was to make possible conceptual arguments that have

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<sup>14</sup>In this chapter I am using the term neoliberalism to indicate a political philosophy, except where otherwise indicated. By political philosophy I mean neoliberalism as a method or system of argument about the way the world ought to be and also as a way to explain and elucidate the moral reasoning behind the collective decisions taken by a social order. That is to say, neoliberalism as a political philosophy is how we relate the content of our thought to our action; it is a prescriptive world view. However, neoliberalism is typically understood more narrowly and pragmatically as an economic policy program. While not interchangeable, these terms are often used by neoliberals, journalists, and others in ways that confuse and blur the distinctions between them as political and economic conceptualizations. In this chapter and elsewhere I will endeavor to make clear which usage is relevant to my – and to the neoliberals' – argument.

<sup>15</sup>For the purposes of this chapter, I will call this dominant theory neoliberalism, but over time the theory has been known by a number of names and has been often variously referred to as laissez-faire, libertarianism, free-market capitalism, Freiburg School or Chicago School fundamentalism, as well as other terms according to its particular historical form and implementation. So, the current version of the theory that is under examination here I will simply refer to as neoliberalism, because it has become the predominant usage in the post-WWII period.

proven to be important obstacles to ascribing moral responsibility to corporate entities. To understand how that happened, this chapter has two principal aims as it argues against neoliberalism: one aim is to examine the ideas that constitute the theoretical basis of neoliberalism, and the second is to show how those ideas, and distortions of the theory formed from them, have been deployed to resist or refute ascriptions of corporate moral responsibility.

In the contemporary form of economic organization of the advanced western societies, generally referred to as financial capitalism, it is my contention that by looking at the theoretical foundations for the arguments of neoliberalism it is possible to identify its principal set of ideas and, importantly, their assumptions. In those ideas and assumptions we can discover how it is possible that they shield corporations and their collective acts and omissions from moral responsibility. Consequent to their wide-spread adoption, the implementation of neoliberal ideas has led to global financial crises and very significant impairments of socio-economic stability in the nations that have been affected by those crises, and injuries to the well-being of people all around the world.<sup>16</sup> This critical understanding of the theoretical foundations of neoliberalism is essential to understanding both the conceptual and practical problems of corporate moral responsibility.

This chapter has four structural elements. In the first element I introduce the basic concepts of neoliberalism as a body of thought. In the second structural element I present a brief history of the development of neoliberalism as a theory and ideology. The third element of the chapter addresses the problems and distortions of neoliberal theory in the contemporary period; this includes both indirect and direct effects on attempts to assign moral responsibility to corporations. The fourth element makes a specific connection between the theory of neoliberalism and its relationship to the persistent problem of ascription of moral responsibility to commercial corporations. These elements are elaborated in brief form below.

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<sup>16</sup>It is, of course, not just the crises themselves, but the neoliberal policy remedies that have been applied to resolve the crises that have caused further injury and deprivation to the affected populations.



### **A Short Survey of the Four Chapter Elements**

This short survey previews the structure of this chapter. I want to examine the theoretical basis that lies in the history of neoliberalism and its economic, political and legal arguments that are either productive of political conditions or practical effects in policy and practice that are brought against ascriptions of corporate moral responsibility. The first chapter element distills the two essential arguments of neoliberalism: individualist absolutism and demands for limited government (a weak state). Those arguments are typically raised in opposition to ascriptions of moral responsibility of corporations.

In the second structural element of the chapter I will briefly cover the history of modern neoliberal thought. I present there a short description of the development of neoliberalism, and describe the collection of ideas by which it is comprised. The purpose of presenting an historical element in this chapter is to lay a sufficient foundation for understanding subsequent problems, deficiencies and distortions with later applications of neoliberal theory to policy. In this second element the short descriptive history is itself comprised by three periods. The first is an early period of European thinking about the philosophical roots of individual liberty and threats to that liberty as seen by early neoliberal thinkers. A second historical period is concerned with the time between the world wars of 1914-18 and 1939-45, but is mostly concerned with how events during the 1930s influenced neoliberal thinkers. The third period comprises the rise, consolidation and the further development of neoliberal thought following WWII to the present time.

The third structural element of the chapter shifts from historical to conceptual aspects of neoliberalism. In this part I examine the problems and distortions of neoliberal thought as it was originally conceived and show those ideas to be conceptually flawed and thus wanting as a conceptual framework. Neoliberalism is asserted to be a theory whose economics are a law of nature, but in reality it is a human construct, a political policy-oriented ideology and not purely an

economic theory, as it is claimed (Kotsko 2018). Neoliberalism can be shown to be based on faulty assumptions about human nature and economic behavior. The insistence on the part of its adherents that neoliberal economics is a form of natural law has led policy-makers to attempt to solve social and political problems with economic policies that match neither the nature of human beings nor the demands of contemporary economic, social or political problems. In this part of the chapter I will show how neoliberal theory contradicts itself. Due to this contradiction neoliberalism produces socio-economic results that, rather than enhance economic activity, have wide-spread negative effects such as slower economic growth, growing social and economic inequality, diminished institutional research and development, lower reinvestment in productivity-enhancing capital stock, and reductions of worker training and education as well as suppression of wages and benefits. I will also address how neoliberalism mis-applies idealized eighteenth century principles about the nature of the economic order to the very different socio-economic reality of the twenty-first century.<sup>17</sup>

The fourth element is also conceptual, but addresses the philosophically and legally more difficult connection between neoliberal theory and corporate moral responsibility. In this, the fourth element of the chapter, I examine and explain how the difficulties in assigning moral responsibility to corporations has become embedded in legal as well as socio-economic thinking and practices as they are informed by neoliberal theory. The fourth element of the chapter will show how it is that the core set of ideas comprising neoliberalism have failed to cohere, yet still have the persistent effect of permitting the avoidance or evasion of assignments of moral responsibility to corporate entities. The rise of neoliberalism as a popularized body of ideas has culminated in problematic and distorted socio-political policy practices under the rubric of an efficient and effective economic

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<sup>17</sup>The emphasis in this chapter is on corporate capitalism, by which I mean capitalism in the liberal-democratic post-WWII, New Deal, Great Society and Washington Consensus period. This form of capitalism is characterized by predominance of the legal corporate organizational form as contrasted with previous organizational forms such as mercantilism, partnerships, or individually owned industrial enterprises. A particular emphasis is put on financial capitalism.

theory in our current, financialized form of capitalism. The functional benefits of financial capitalism are expressed in claims that are made for it of providing essential social and public goods.<sup>18</sup> But in reality it is neoliberalism's deficiencies and irrationalities that produce serial crises requiring bail-outs and rescues and various forms of impoverishment in austerity periods during economic recovery that characterize the current, financialized form of capitalism. It is here where we see the actual outcomes of financialized capitalism in the retardation and impairment of social development, diminished well-being, and weakened community solidarity rather than an enhancement of the essential aspects of the socio-economic order. In addition, it is in a normative sphere that financial capitalism appears as self-contradictory (Jaeggi 2016). Yet despite these empirical and normative realities, efforts to hold financial sector corporations to even the most modest moral responsibilities are of little avail.

### **A Brief Introduction to the Basic Argument of Neoliberalism**

The basic argument of neoliberalism is that there is a remedy for the ancient problem of how best to protect individual liberty in the long struggle between the demands of the collective (the state) and the desire of individuals for freedom. The solution to this problem of the preservation of freedom for individuals, according to neoliberal thought, is to do what is required to secure individual liberty by preventing the inevitable tyranny of centralization (and consequent loss of individual autonomy) that is alleged to come with socio-economic and political collectivism (Hayek

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<sup>18</sup>One crucially essential public good is financial stability from which everyone benefits and none can be excluded. But in financialized capitalism stability is also one of the most difficult of all public goods to supply. The neoclassical economics and economic policies of neoliberalism that underpin financial capitalism tend to accept without question that financial markets are self-regulating and intrinsically stable. They are not. This is because "...instability is baked in the economic cake." (Wolf 2012). Expansion of credit in free-market economies (in which issuing credit becomes an asset with a matching liability of the borrower as an obligation to repay) is limitless and can be expanded at zero cost. Because there is no incentive for private entities (financial institutions such as banks and e.g., other entities in the shadow banking sector) to restrain themselves from issuing credit there is an inherent instability built into credit decisions and into the overall economy. Milton Friedman, a Chicago School neoliberal economist, recognized in this a risk of banking collapses and the need for prophylaxis by government intervention but this is difficult to substantiate in the literature. It remains a contentious claim about Friedman; for example see (Machaj 2007).

2001, p. 64), (Jones 2012, p. 68). How is this to be prevented? If collectivism is the result of central government (i.e., the state) and how it collectively organizes, plans, decides and controls the allocation of resources on behalf of its subjects then in its simplest form, the neoliberal argument goes, it is collectivism (strong-state government) that is the problem. By absolutizing the individual and shrinking government to the greatest possible extent, neoliberals say, the liberty of the individual can be protected and preserved.

Additionally, and to further resolve this problem of the threat of tyranny, neoliberal theory issues two demands: first, that there be an acknowledgement of the reality that there cannot be a consensus agreement on the values and the ultimate ends and aims of social life. Their fear is that if liberal technocratic central planners determine – in place of a general consensus – what is the best life, and how it should be lived or provided for, there will inevitably be disagreements and conflict over the assumptions underlying the values that are asserted by their determinant consensus. The second demand of neoliberalism as an answer to the potential for conflict owing to a lack of general consensus is to acknowledge the primacy of the (economic) price mechanism, which allows markets to determine what is of value rather than to have the value-determination made by a planning collective of technical experts. The primary deficiency of any collective of planning experts, neoliberals say, is that even experts cannot possibly have all the information that can be brought to bear in a competitive market. The corrective for this deficiency, according to neoliberal theory, is the price mechanism.

In summary, neoliberal policies have aimed to deregulate economic activity, to promote free trade globally and to build a market that is both global and free of government intervention to the greatest degree possible, save for legal protections of property rights and to insure competition in markets. In different times and in different places the pursuit of these goals has followed a common theme – a set of ideas about individualism, small states, self-regulating markets and the price

mechanism. Without doubt, under neoliberal theory great wealth has been produced and freedoms have been enhanced in many places, especially in the post-WWII period. But since the global financial crisis of 2008 it is clear that the negative consequences of neoliberal policies have breached normative expectations to the extent that despite its proponents' rhetoric about economic efficiencies and liberating qualities, the social, moral and political deficiencies of neoliberalism raise the most serious questions about its claims. This questioning and growing doubt about the net socio-economic value of free market fundamentalism is especially true about both the desirability of a limited role for government and of unregulated activities of corporations around the world. A brief look at the history of neoliberalism will help in understanding how we have arrived at this state of things.

### **A Brief History of Modern Neoliberalism – Roots and Origins**

Coherent sets of ideas either as a theory or as an ideology are likely to neither lead back to a solitary figure working completely alone nor are they likely to have come to fruition in total isolation (Mannheim (Undated edition) [1936], p. 3). To the extent that this is true as a generalization, it is certainly true of the body of thought we identify as neoliberalism. The roots and origins of neoliberalism reach back to critiques of Plato and Aristotle and forward to the current period in which the neoliberal theory of globalized economic and political development are idealized. While it is not my intention to explore in detail the entire corpus of literature surrounding neoliberal theory, it is my intention to offer an overview of the body of neoliberal thought itself as a way to understand the philosophical question at issue in this study – the question of corporate moral responsibility.

It is neoliberalism as a theory against which I am arguing because its emphasis on individualism and a minimal state obscures the corporation and masks its role in socio-economic life from scrutiny with respect to outcomes, regulation and from normative expectations to constrain aberrant

behavior in the interest of the societal collective. As a consequence, the potential is diminished that they will meet the obligation they carry to provide public goods, or at a bare minimum, not do intentional injury. Neoliberal theory derives from a combination of classical liberalism of eighteenth century laissez-faire which asserts the necessity of negative freedom for commercial interests from government intervention, with further iterations of liberal theory such as Adam Smith's "invisible hand".<sup>19</sup> In the nineteenth and twentieth centuries liberalism then developed more elaborated ideas of the minimal state, individual autonomy and property rights that have been expressed in post-WWII neoliberalism. It is those more extensively elaborated ideas that have played a crucial role in our difficulties with corporate moral responsibility.

There are three Austrian economists that are central to understanding the origins and development of neoliberal thought. While many others were involved in the contributions made to the whole body of thought I will focus on Karl Popper, Ludwig von Mises and Friedrich Hayek as the most prominent representatives of neoliberalism as a theory, an ideology and as a collection of policy prescriptions and practices. Their books, Popper's *Open Society* volumes, Mises' *Bureaucracy* and Hayek's *The Road to Serfdom* were influential and persuasive contributions to establishing neoliberalism as the dominant theory of capitalism in our time.

There are many ways to portray the phases and development of the modern period of neoliberalism, depending on what features and characteristics require emphasis and analysis.<sup>20</sup> Here I am dividing the modern period of the development of neoliberalism into three phases to capture the evolution of the ideas and the concerns that occupied the principal neoliberal figures as follows: first is the inter-war period of 1918-1945, during which modern neoliberal thought

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<sup>19</sup>It is classic liberalism that I am referring to here. Liberal political principles include those holding that every individual has a right to life, freedom from arbitrary capricious unlawful rule, as well as private property rights. It is foundational that government must not violate these rights in without recourse to independent legal protections. See the Stanford Encyclopedia of Philosophy entry on JS Mill (Brink 2018).

<sup>20</sup>See David Stedman Jones for one example of twentieth century phases of neoliberalism: (Jones 2012, pp. 6–8).

emerged as a set of principles and a policy program. The second phase is the post-WWII period when neoliberalism came to dominate both the economic and the political thinking of Anglo-American economics and politics. From about 1980 in the third phase marked by the election of Ronald Reagan and Prime Minister Thatcher the transatlantic network of neoliberals attempted to globalize both the theory and policy practices of individual absolutism and weak-state limited government.<sup>21</sup>

Before the three phases of modern neoliberalism's development, however, there were criticisms of collectivism by neoliberals that reached back to ancient philosophy. Beginning with Plato, neoliberals found reasons to worry about the collectivist tendencies of Plato and others. On Karl Popper's reading, Plato is the first to embody in the state a collectivist society in which the whole (the state) is greater than the individual. In volume one of *The Open Society and Its Enemies: The Spell of Plato* Popper offers criticism of Plato, Aristotle and Heraclitus.<sup>22</sup> In these thinkers Popper sees their historicism as the root threat to the open, free society he idealized.<sup>23</sup> According to Popper, the state for Plato is a collective that can determine human development or the disintegration of society. In such a society, Popper says, the truth becomes elastic and is what serves the state as the embodiment of the collective and subordinates any other consideration as a practice that "[...] injures and endangers the city" (Popper 1971b, 1:143). The truth, as the product of the critical powers of the individual, would be subordinated to the needs of the collective. For

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<sup>21</sup>In globalized financial capitalism it is notoriously difficult to effectively regulate MNCs whose characteristic global operations make them opaque to oversight and intervention by individual national governments. The consequences in the global financial crisis of 2008 of this third phase are dealt with below.

<sup>22</sup>In volume two, Popper perceived a similar threat from Hegel and Marx for their subversion of the freedom of the individual.

<sup>23</sup>Historicism, as it was critiqued by Popper, is the a doctrine that assumed there is a set of changeless laws of historical development that regulate human affairs. This doctrine holds that history is controlled by specific evolutionary laws and upon discovery would enable the prediction of the destiny of humankind. This, according to Popper, began with Plato and continued in Aristotle, Heraclitus, and then Hegel and Marx. Popper sees the doctrine as a threat to social freedom because it undermines individual freedom. More specifically, Popper argued that historicist thought caused confusion about the basis for a free, open society (Jones 2012, p. 42).

Popper this is an description of what could only be understood as a closed, tribal society, based on magical thinking and inimical to the requirements for social development and human progress (Jones 2012, p. 41).

Individualism and altruism, which lead to the breakdown of tribalism and the rise of democracy, are for Popper the basis of Western civilization, and it was individualism that was at the center of neoliberal philosophy as conceived by Popper, Hayek and Mises. Individualism was understood to be central to Anglophone Enlightenment economic and political thought. The New Deal and social democracy were viewed as taking freedom of choice from the individual and this formed the background of Popper's antipathy to the ancient philosophy of Plato. Historical prophecy became confused with reasoned hypothesis through the scientific claims of dialectics and historical materialism. For Popper, it is not through historical prophecy but our own scientific predictions that the future depends.

In volume two of *The Open Society and Its Enemies*, *The High Tide of Prophecy: Hegel, Marx, and the Aftermath*, Hegel, seen by Popper as an historicist (a historicism of prophecy and necessity), exemplifies the renaissance of tribalism and restores the totalitarianism of Plato (Popper 1971a). But, for Popper, belief in historical prophecy erases the incentive for individuals to take responsibility for their individual choices and freedom of action.

Popper thought that in periods of social change historicism became prominent and that this was the case when Hegel adopted much of Heraclitus's thought and incorporated it into his reaction to the French Revolution as an example of the periodic disappearance of tribal forms of social life. This was true as well of the period of the 1930s and 1940s in which historicist and utopian ideas resulted in catastrophic events associated with facsism, Nazism, Communism and world war. A dogmatic faith in holistic explanations derived from what were purported to be laws of historical inevitability, in Hegel's case that of the nation-state and in Marx's case as a critique of capitalism, the



inevitability of class warfare and the ultimate dictatorship of the proletariat. In place of these, Popper urged a non-dogmatic exercise of critical reasoning, of debate and a unwavering pursuit of truth and scientific knowledge.

The alternative for Popper, as an antidote to the dangerous ideas of historicism, is recognition of the need for reform to blunt the worst aspects of capitalism, but through pragmatic reform, not class war. There is a role for government intervention in Popper's view, one which is indirect as a legal framework of protective institutions with clearly delineated powers. This would allow government to make policy adjustments based on debate, discussion and experience. There is another, more direct mode of intervention that limits the power of the state institutions to act. This is discretionary power of the state to act on a short-term basis, but it too carries risk of abuse or seizure of state power by rogue actors. In any case of state intervention Popper has a concern that it would concentrate too much power in the state apparatus. Popper acknowledged that individuals had to be responsible to take decisions, but this depended on putting faith in individual critical reason and this makes assumptions about individuals and their rational capacities, critical reasoning and tolerance for public debate and discourse that are hard to justify. Philosophically, Popper was inspired only by Socrates, whose idea of freedom was rooted in individual critical rationality. Popper's challenge was to establish the application of critical reason to social problems within a liberal democratic framework and free market capitalism with a heavy emphasis on individual liberty, i.e., to progressively rationalize the irrational. His chief fear was of the erosion of individual critical faculties by historicist ideas (Jones 2012, p. 41). Ludwig von Mises, who like Popper understood Plato's antipathy to democracy, argues that he "elaborated a plan of totalitarianism." "The outstanding fact about the contemporary ideological situation is that the most popular political doctrines aim at totalitarianism, the thorough abolition of the individual's freedom to choose and to act. No less remarkable is the fact that the most bigoted advocates of such a system

of conformity call themselves scientists, logicians, and philosophers. This is, of course, not a new phenomenon. Plato, who even more than Aristotle was for centuries the *maestro di color che sanno*, elaborated a plan of totalitarianism the radicalism of which was surpassed only in the nineteenth century by the schemes of Comte and Marx.” (Mises 1962, p. 132).<sup>24</sup>

Neoliberalism in the modern period has emerged as a distinct body of thought over a long time, beginning with the liberalism of Adam Smith in the eighteenth century. Among Smith’s sources were the work of David Hume and David Ricardo and the anti-corn law arguments of the Manchester School (Jones 2012, p. 11).<sup>25</sup> Although the early period of neoliberal thinking goes back to Smith, this period is more correctly described as part of classic liberalism that traces a historical line from Thomas Hobbes to John Stuart Mill. In this period of liberalism the central assumption is that the individual has primacy over the polity, but the polity has precedence over the economy. It is essential to liberal economic freedom that the political liberty of the individual be preserved (Schmidt 2018, p. 70).

### ***From the 1920s to 1945***

In the twentieth century neoliberalism took on its distinctly contemporary character. In Vienna during the 1920s economists led by Ludwig von Mises were engaged in a debate about economic planning that centered on the question of whether the price mechanism or central planning would be the most efficient distribution of scarce resources.

Mises was Influenced by Carl Menger, the founder of the Austrian school of economics. Menger and the Austrian school held a strong belief in both free markets and fixed economic laws that were centered on individuals.<sup>26</sup> The special focus of the Austrian School was the power of the price

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<sup>24</sup>The phrase is from Dante (*Inferno IV*), *Maestro di color che sanno* refers to Aristotle: literally, "the master of those who know".

<sup>25</sup>Liberal sentiment against the corn laws, a form of economic protectionism, was due in part to the perception that the laws were a restriction on trade and an instance of unnecessary governmental intervention.

<sup>26</sup>The position taken by the Austrian School on fixed economic laws contradicted the German Historical School of the

mechanism to allow spontaneous organization of economic life of autonomous individuals (Jones 2012, p. 49).

Mises is probably best described as a free-market libertarian with a pure ideological position.

Mises' book, *Bureaucracy*, a short polemic contrasting the bureaucratic mode of management and a profit-making system (Mises 2007 [1944]). He saw bureaucracy as unaccountable and removed from people's real needs and wants. Mises claimed that the main concern of a bureaucracy is to comply with rules and regulations and the resulting rules-oriented incentive structure produces distorted outcomes.

Trends toward collectivism had deeper roots in the nineteenth century, but continued in the early twentieth century United States with increments of government control, planning and nationalisation of business. It was thought by Mises that pressures on public sector managers and bureaucrats were always to increase expenditures to improve public services and thus caused bureaucrats to seek more funds and resources, limited only by rules and regulations. This was seen by neoliberals as invariably a bad thing despite increasing demands for public services for the welfare of the general population and for businesses to expand and grow. Mises defined bureaucracy as a mode of thinking and organization necessary to the relationships implied by public service management. The difference between incentives of public sector and private, profit-making sectors is that the latter puts a high premium on improvement, while the former is driven by rule-following (Jones 2012, pp. 53–54).

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late 1800s whose social science professors saw regularity in economic phenomena as heterodox. To claim that there was regularity in the workings of the economy would mean that governments were not all powerful and that governments would have to acknowledge that there was, so to speak, a higher, but static power than that of the historical collective represented by the political class. The German Historical School was influenced by Darwin's theory of evolution and argued against the atomism and deductivism of neoclassical economics with a holistic approach that connected the economy to the socio-political and cultural environment of the society. The eventual dominance of Austrian economic theory as neoliberalism has significant implications for the legal theory of the corporation and ultimately for corporate moral responsibility.

In Mises' view, the rule of law must govern the free market and a small public service, but must also include careful legislative proscription of powers of government. Mises' critique suggested the problem with bureaucracy was the entire political system (Jones 2012, p. 55). It restricted individual freedom of autonomy and assigned more tasks to government. The culprit is not the bureaucrat but the political system.

The New Deal in the US was thought to be a quasi-constitutional disguise for dictatorship. Growing government interference with business was problematic. Mises argued for a strict separation between business driven by profit motives and public service governed by democratic accountability. Mises did not believe it possible to mix market mechanisms and public tasks. He did believe that the role of the state should shrink and markets would deliver the services people demanded. Neoliberalism for Mises, however, was a theory that did not entrench the interests of particular classes or ideas, but rather the market liberated the individual to experiment and thus improve his or her fortunes (Jones 2012, p. 56). The market was a fundamentally democratic arena for Mises; unsuccessful business would be subject to market discipline, resulting in greater efficiency and effective delivery of socio-economic goods and services. Mises was the most uncritical of markets of the neoliberals, a responsive hub around which consumers reigned supreme. It was for Mises and the neoliberals always better to have private markets deliver public goods. The unresolved problem was that markets were not self-regulating except in the sense that crises cleared out the weakest players but could not provide predictable stability (Jones 2012, p. 57). The problem of markets not self-correcting was not only theoretical. In response to growing economic instability, in Cambridge John Maynard Keynes argued for counter-cyclical spending by government as a way to answer the problem of severe, repeated economic contractions. There were nineteenth century financial panics in the years 1819, 1825, 1837, 1847, 1857, 1866, and the Long Depression of 1873-96 that included the panics of 1873, 1884, 1890, 1893 and 1896. In the

twentieth century there were panics in 1901, 1907, 1920-21, and 1929 (Skrabec 2015).

Hayek, a student of Mises, took up the question of planning versus prices and argued in opposition to Keynes for the price mechanism as a method unmatched by any central planners' efforts, no matter how expert the planner might be. Following the Wall Street collapse of 1929 the argument in favor of central planning gained considerable credibility and Keynes' work rose to a prominent position by promising to end recessions.

Neoliberal theory as it was explicated by Hayek forms a focal concern in this chapter. The three points of Hayek's thought on which I will briefly concentrate below are (1) his ideas about individual absolutism in which the individual is primary, (2) the need for a minimal state to prevent propagation of what these thinkers perceived to be its tyrannical tendencies, and (3) Hayek's predisposition that even in a radically minimalized state there must be room for a legal apparatus to protect private property and insure competition among market participants.<sup>27</sup> While his best-known neoliberal colleagues Popper and Mises were instrumental in the development of neoliberal thought, Hayek is the focal figure here because he was the most influential in both mobilizing the body of thought from abstract concepts into a movement, organizing the movement and developing its potential as an apparatus for policy-making.

At the core of the neoliberal ideology of radical individualism and minimal government there is a similarity of first principles shared by Popper and Hayek. As with Popper, Hayek believes in a first principle that the importance of the individual is of primary concern. As a second first principle Hayek is convinced that conceptualization of the world is unreliable and of limited value.<sup>28</sup> This is misleading however, because Hayek infers from the first principles not merely a primary, but an

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<sup>27</sup> Hayek's concerns with legal issues form a legal-economic niche that has an enabling capacity for individual autonomy. The provisions Hayek makes for legislation, and for the rule of law are addressed below.

<sup>28</sup> Conceptualization is defined as a general and abstract understanding of human communal existence (Gupta 2002, p. 3).

absolutist understanding of individualism. This for Hayek is a matter of faith. And while Popper did not entirely reject collectivism Hayek considers any conceptualization of the collective — an abstract understanding of the whole social community — to be irrational. With respect to social ends, Hayek cannot completely deny that social and political processes are collective, but he sees this as a coincidence of individual aims and those, in his view, remain individual in all circumstances. Therefore action taken in common is possible only where individual people agree on the ends, but these are cooperative ventures in which they treat the cooperative effort as a means to their own individual ends (Hayek 2001). The second first principle concerns the limited and faulty conceptions about the social order of which individuals are capable. Because individuals are so limited in the scope and scale of their understanding Hayek thinks it is impossible for them to apprehend the needs of the whole of society. It is for this reason that Hayek narrowly limits conceptualizing about social values and human ends to the values of individuals that only partially represent the social whole. This is where Popper and Hayek differ significantly, and it reveals Hayek as the more extreme of the two thinkers. Popper acknowledges that conceiving an understanding of society is an unavoidable — even if error-ridden — effort that people will make, while Hayek wants to entirely avoid the dangers of overreaching by trying to comprehend the whole of society and holding false and misleading conceptions about institutions and universal social values.

Freedom, for Hayek, is a reflection of his position on individualism. There is only one conceptual stance for Hayek, which is the absolutism of the individual and that means that the individual must be free of coercion of any kind from any other individual or group. What Hayek appears to argue is that to be free, atomized individuals should be shielded from outside influences whether from other individuals or from the collective.

### ***From 1945 to 1980***

Following the catastrophe of WWII, by the middle-1940s Hayek was intent to create and organize a

neoliberal policy program and political strategy to challenge collectivism issuing from Nazi and Soviet totalitarianism, the New Deal in the US, and UK social democracy. Roosevelt's New Deal and Hayek's *The Road to Serfdom* both emerged in 1944. Hayek and other neoliberals at the time saw only the threat of socialism, collectivism and totalitarianism in these government programs. As WWII ended Hayek capitalized on *The Road to Serfdom*, published in 1944, intending to build a society of scholars to defend the core tenets of freedom through a neoliberal international based on individualism. Hayek understood that ideas become policy slowly; thus, through a transatlantic network neoliberalism had to focus on and change the minds of intellectuals as opinion-leaders to ensure that free markets would prevail (Hayek 1949). This was accompanied by the formation of a transatlantic network made up of think tanks, businessmen, journalists, and politicians to propagate the message of free markets as the best strategy for political ends. This activity occurred separately from the academic work of the economists involved in the project (Jones 2012, pp. 4–5).

After 1945, Hayek and then Milton Friedman at the University of Chicago first helped to create, and then to synthesize, a neoliberal policy program and political strategy. In 1947, Hayek brought a disparate group of intellectuals together in Switzerland to discuss how liberalism could be defended in the face of the challenge of “collectivism” — an all-encompassing term that included Nazi and Soviet totalitarianism, New Deal liberalism, and British social democracy.<sup>29</sup>

At the middle of the twentieth century center and center-left political and economic ideas dominated, but by the end of the twentieth century market fundamentalism was in a nearly unassailable position until the global financial crisis of 2008 (Jones 2012, pp. 22–23).

### ***From 1980 to 2008***

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<sup>29</sup>This was the formation of the Mount Pelerin Society, named for the location in Switzerland where the meeting was held. It was here that Hayek put into motion his plans for a transatlantic body made up of groups from Europe and the United States to counter what Hayek perceived as a growing threat from supporters of collectivism in the form of social planning, government interference in business, and socialism (Jones 2012, pp. 73–84), (Mirowski and Plehwe 2009).

In the period from 1980 the neoliberal movement became more policy-oriented in practical political terms. In 1979 Margaret Thatcher, as prime minister in the United Kingdom, and Ronald Reagan, inaugurated in 1980 as President of the United States, brought neoliberal theory into their respective governments and implemented policies with an emphasis on free markets, an animus for social democracy and against the economic and political values of the New Deal. In the United States Ronald Reagan put together an unlikely coalition made up of working-class Democrats and large corporate interests that has had extensive and persistent political ramifications.<sup>30</sup> The social and economic upheaval of the 1960s and 1970s had created an opportunity neoliberals seized upon to roll back public confidence in government efficiency and moral authority and to assert the primacy of individualist absolutism and market fundamentalism. Consequently, neoliberalism gained a nearly unchallenged superiority as a socio-economic paradigm in the period of the Reagan-Thatcher years and then until 2008 despite the realities of deindustrialization, out-sourcing, off-shoring, and the deskilling of the labor force since the 1960s (Braverman 1998[1974]).<sup>31</sup> Then, after the GFC, challenges began to rise to question the unqualified claims that neoliberal theory made about market efficiency, and the political policies that it enabled.

The GFC of 2008 was the result of regulatory deficiencies (among other failures) in the advanced economies that allowed risk behavior to run ahead of the capacity to contain the damage and harm resulting from the acute manifestation of the crisis. The result was that financial sector corporations did not shoulder the burden of moral responsibility for their actions leading to the GFC. The widespread perception of the public was that those who caused and then benefitted from the risk behavior did not suffer from the consequences which were not merely economic, but social

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<sup>30</sup>Eight years after the GFC (and its consequences) this coalition led to an outbreak of authoritarian populism reacting against the crisis, the bail-out of the financial sector, and the imposition of austerity in both the US and the UK.

<sup>31</sup>Braverman's interest in what was happening to work and to labor, although not specifically about neoliberalism (which was not a coinage in use at the time he wrote), can be traced back to efforts to exonerate capitalism for a variety of socio-economic ills and details the systematic degradation of work in the period.



and personal. In many cases financial sector principals benefitted from not only continued employment, but bonuses and bailouts for which the public was made to pay while global economic activity was significantly damaged. This caused deep and lasting resentment because the damages were perceived to be unfair along several dimensions, unjust with respect to the remedies and exploitative of the public's vulnerability to paying to save the financial system. Thus, neither was there no (or very little) moral responsibility taken by the banks and other financial institutions, nor were there substantial legal, social or other forms of responsibility for the crisis despite its very high cost in both economic and non-economic terms.

### ***Hayek on Spontaneous Order v. Planned Order***

The question of whether Hayek's thought is a social theory or one of economics lingers in debates about where Hayek's motivating concerns lie, with society or with economics. And the answer to this raises deeper questions about his sense of the importance of order. If it is a social theory is this as a consequence of his concern with economic order or with social order itself? Where does his concern with spontaneous order lie?<sup>32</sup>

One of Hayek's central concerns is the nature and significance of spontaneous order. Hayek was interested in the question of spontaneous order as the philosophical underpinning of his critique of planned socio-economic orders by centralized collective states. His interest seems also to reveal a deep interest in social questions and theory in comparison to the emphasis that is typically put on Hayek's economic prescriptions. More specifically, what Hayek was dealing with is how a spontaneous social order in nature can be explained and whether order can be undesigned. That is,

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<sup>32</sup>In an entry in the Stanford Encyclopedia of Philosophy, "Friedrich Hayek", David Schmidtz addresses Hayek's concern with the origin of order in the natural world (Schmidtz 2017). Hayek rejected the idea that there had to be a designer for there to be order in nature or in society. Instead Hayek argued that social theory begins with the observation of ordered structures but that those structures resulted from the undesigned action of many individuals. The information necessary for commerce that is found in prices enables a spontaneous order to emerge from the bargaining process and in turn, from the spontaneous order there is the appearance of communities as markets are formed. Cooperative undertakings of individual action in markets, trading and commerce are at the root of social order for Hayek.

do we need to explain order in nature by the concept of a designer, if prediction is not possible in either natural selection or in social and cultural evolution. Hayek, consistent with his rejection of economic planning also rejected designer arguments as fallacious in both nature and in society. Just as unforeseen and unplanned evolution can explain the emergence of order in nature, so is it equally arguable that the operations of a spontaneous, unplanned market system can explain the emergence of socio-economic order. The question is centered on a comparison of spontaneous order with planned order and if socio-economic orders differ with respect to consequent affordances of freedom and individual autonomy. When markets emerge as part of cooperative ventures, the market process, based on partnerships formed for mutual benefit will result in communities. In an idealized Hayekian conception then, communities tend to be spontaneous orders as they are formed by the market process rather than by an authority. Thus is the claim made that a spontaneous social order based on the price mechanism is superior to a planned system. And this takes us back to individualism as market participants respond to prices and follow their individual preferences and decisions. It also takes us back to the insistence that there be as little government interference in the workings of markets as possible, leaving the market participants to sort things out through taking and rejecting prices, but without central planners pretending to have better information than that provided by price signals.

The spontaneous system, according to Hayek's thought, has its own logic that no planner can change. Put simply, price signals economize on information. This helps to explain why price signals are so important in Hayek's thought. Price signals do what nothing else can — they enable people to form mutual expectations, and thereby to buy and sell in markets. The claim is thereby substantiated that a spontaneously generated, individualistic socio-economic order based on the functioning of the price mechanism in markets makes everyone better off. For Hayek, when information is not only widely dispersed, but is also impossible to acquire because it is either

inaccessible or does not exist at all, what people are willing to pay effectively represents that information through prices (Schmidtz 2017, p. 10) and (Hayek 1945). This aggregate information is something no central planner can find or use to solve the problem of socio-economic planning according to the theory.<sup>33</sup>

What has happened to the concept of price signals in the period of financial capitalism and particularly in the global financial crisis makes Hayek's thinking problematic for assignments of corporate moral responsibility. Prices represent background information in one variable (there is only one thing people who are trading need to know, not many things). Can we compare the spontaneous order that is idealized by Hayek with the actual order (and its consequences) that is represented by financial capitalism? Hayek and other neoliberals assert that planned orders are by necessity inferior to those that are spontaneously generated by individuals trading in free markets that operate on the basis of prices as the determinate factor in revealing values and preferences. But how does Hayek's conceptualization hold up against the historical record? Has the spontaneous order that Hayek anticipated failed to emerge, or has something else happened? What did we do (how did we manage) before price signals were available to guide human behavior and organize the social order? And is the problem with the prices themselves or with a rigid application of the concept of minimal government as a political philosophy? Do planned economic orders always rank more highly than others in their threat to human freedom and liberty, or is there a possibility of some optimal balance between markets and the need for regulation and intervention to prevent crises? Looking at Hayek's work on planned economies and their specific disutilities – on what does he concentrate as the worst deficiencies?

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<sup>33</sup>This seems unlikely to remain true for the long term with the advent of machine learning and data aggregation on a massive scale. The assumption that price mechanisms in free markets will retain optimal market price-setting performance that is superior to other methodologies is challenged by recent work in machine learning where price optimization and dynamic price-setting are not only computationally feasible, but are displacing conventional methods of price discovery. This has been happening in equity markets, insurance and consumer purchasing patterns for some time. See, for only one example of price dispersion, (Bodoh-Creed, Boehnke, and Hickman 2019).

What appears to be clear is that markets do not invariably work as efficiently and effectively as Hayek and other neoliberals have theorized. And because they do not, the frequent failures of markets that result in crashes and crises raise the most serious questions about the theory itself, especially when in the face of a severe market failure government is forced to step in to rescue the system from collapse. But even in less extreme cases of markets failing to deliver on the neoliberal promise, when the normative expectations of citizens and consumers are violated and there is no disciplinary response (as that would violate the terms of neoliberal theory about government intervention), then moral questions arise about the fairness and justice of the theory not just as a collection of ideas but as practical, pragmatic policies.

### **The Problems of and with Neoliberalism**

While the basic argument of neoliberalism appears to be about economics, neoliberalism is in reality political, and is not an exclusively economic approach to the questions of individualism, free markets and precluding the growth and power of the state. This results from the actuality that the political economy of capitalism, especially financial capitalism, is not exclusively an economic policy exercise. It's political in the sense that it asserts the theoretical necessity of free-markets to promote a corporatist ideology of negative freedom from government interference and for the smallest possible state to reduce the state's capacity to regulate and interfere. The role of the state is minimized in neoliberal theory and ideology to merely insure property rights and protection for corporate interests through the police power of the state and military power to protect trade and access to resources. Realistically, neoliberalism is thoroughly political because it is a convergence of economic and political interests, policies and resources. It claims that solely through the operations of markets free from government interference and the working of the price mechanism in competitive markets that individual liberty and freedom can be preserved. But markets are not and cannot be free in a pure economic sense. To operate effectively and efficiently markets must

regulate and be regulated. This need for regulation by a superordinate body and a legal framework for the proper functioning of markets introduces a political aspect to the economic claims of neoliberal theory (Schmidt 2017, pp. 13–14). Neoliberalism cannot be, after all, a purely economic practice in real life. Although these two principal aspects of the theory should be considered separately, in reality the aspects of neoliberalism related to its economic theory and neoliberalism as a social and political theory cannot be entirely separated one from the other.

### ***Economic Aspects of Neoliberalism***

The economic assumptions about human nature and the defects of the neoliberal argument are revealed in several contradictions at the core of neoliberal thought. An underlying economic problem with neoliberal theory is the simple reality that not everything that is of value can be determined by the functioning of the price mechanism in a market operation. There are questions and problems of social, cultural, political and economic life that do not yield to the economism of price mechanisms in markets, and markets cannot answer the difficult, broader concerns of values and moral judgements. But even on its own terms neoliberalism does not conform to its own claims and this is evident in times of economic crisis.

Another contradiction of neoliberalism is that it can be criticized as a form of "bait and switch"; firmly held in the theory there is a promise to citizens and consumers that real competition will be assured among large global market participants, and the state will not intervene to save those whose risk-taking turned out badly. But in the event of an economic crisis, where the systemic negative consequences are declared to be "too great" and the global risk-takers are genuinely at risk, then the promise of non-intervention is unfulfilled and an intervention is deemed appropriate on the grounds that the system must be saved. Hence, the rhetoric is about competitive neoliberal capitalism, but in reality it is state interventionist socialism for corporations in trouble (Blyth 2013, p. 73), (Tooze 2018, Introduction) . This contradiction has been all too evident in the aftermath of

the GFC.

What describes the environment in which neoliberal financial capitalism exists today? It is not an environment of nations as islands that describes the relations among and between economies and societies. The contemporary reality is of a tightly interwoven global network of corporate interests operating as financial institutions. Following, Popper, Mises, Hayek and Milton Friedman, the neoliberal objective of liberating capital from the obsolete laws and unnecessary regulation is achieved by corporations, and particularly by those in the financial sector able to function beyond the boundaries of the individual nation-state has proven to be a recipe for intervention when the inevitable crises erupt.

Corporate monopoly power is an outcome of the inability of the state's functions of regulation and legislation that the market sphere will operate as it is theorized in neoliberalism. Monopolies by definition prevent competition. Yet, in neoliberal theory competition is necessary for innovation in goods and services and that leads to economic growth, or so the theory claims.<sup>34</sup>

### ***Political Aspects of Neoliberalism***

Early neoliberal theorists (these theorists included the pre-war Europeans and post-WWII followers) saw the threat of collectivism as central to their anxieties. At the core of the perceived political threat is the centralizing tendency of strong-state liberal-democratic regimes that caused neoliberals to assert the need for a non-interventionist minimal state. Centralized state power and interference could only lead, in their view, to the least desirable outcome — an inevitable totalitarian state. This raises the question of what it is specifically about liberal democracy that

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<sup>34</sup>That this is not always true is a commonplace. To cite only one of many instances, DARPA (the Defense Advanced Research Projects Agency of the US Department of Defense) is a counter-example. As a government agency and without competition DARPA developed the conceptual basis for ARPANET which was a prototype communications network that led directly to the internet. DARPA also developed the communications protocols that comprise the digital infrastructure of the internet. This government-sponsored project became a public good that has changed the world. The same is true of much basic research in science, medicine and other fields where government supported academic work continues to provide innovations and new discoveries.

worries neoliberals and it appears that centralization itself is sufficient to raise their fears. But there is also the fear that under a Rawlsian definition of liberal democracy — a fair system of cooperation between free and equal individuals — the state that is necessary for insuring the rights, fairness, freedom and equality of those individuals would evolve over time into a strong state and at least impair, if not negate, those same virtues of rights, fairness, freedom and equality (Rawls 1993), (Rawls 1999, pp. 446–448).

What is at work here is a conflict between two needs. One is for people, as citizens, to set aside their self-interestedness and acknowledge the demands of the common good on the one hand. But on the other hand, the concepts of individual liberty and freedom from collectivism that are promoted by neoliberalism depend on not sacrificing self-interest in the interest of the collective, or so the neoliberals claimed. This fundamental conflict describes the ancient political problem I described in the early portion of this chapter — the need for the sacrifice of self-interest for the good of the collective and the intractable collision of that need with human selfishness. What is notable is the relatively recent neoliberal stance on this question: that neoliberal theory demands that individual self-interest invariably take precedence over collective interests. This aspect of political neoliberalism has potential to negatively effect economic prosperity and individual well-being, and in contemporary twenty-first century economic conditions this potential is manifest in neoliberal policy outcomes. These outcomes include slow economic growth due to a lack of investment, stagnant or falling incomes due to wage suppression and anti-union efforts, declining public health due to shrinking of the welfare state and public investment in education, health and medical research and more.<sup>35</sup> Yet if there were to be no restraint on free enterprise, or inadequate and deficient regulation of markets and market actors then, based on the historical record, not only is socio-economic crisis certain to follow as can be seen in the historical record of boom-and-bust

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<sup>35</sup>For example, recent empirical evidence shows that on crucial measures of public health the US is doing poorly; see (Dyer 2018) on falling life expectancy, among other measures in which the US falls behind every western European nation.

economic cycles, but recurrent political crisis as well. To avoid political crisis, the neoliberal position must acknowledge and understand the community's need for stable predictability through regulation and an appropriate application of the rule of law.

### **Contradictions, Faulty Assumptions and Other Deficiencies of Neoliberal Theory**

How markets work and what they can and cannot do is based on neoliberal assumptions that markets are superior to planned societies. In neoliberal theory markets can always and optimally adjudicate between rivalrous values and ideas about the best way to live, individual preferences and the aims of contemporary society. A second assumption of the theory is that individuals are always the best judges of their own well-being and choices. But this assumes that an individual will judge only on behalf of that individual, and not with respect to the collective, because it is through supply and demand that operation of the price mechanism in markets will best determine collective values.

In a more economically technical approach to the provision of public goods neoliberals say that the pricing mechanism will distribute economic outputs with optimal efficiency and thereby send the right signals about what should be produced. This process indicates with some precision where investment capital should be allocated. Prices do not indicate with precision, or indeed indicate at all, however, for the provision of public goods. Yet it is clear that for a properly functioning society public goods are essential. It is only necessary to think of examples such as clean water and provision of services of natural monopolies — utilities and public safety services are among the many prominent examples.

Financial stability and predictability are also among the most important of public goods because these furnish the foundation for collective economic life and individual well-being. It is important to remember that the public good of training and all levels of education as well as the public capital of infrastructure decisively contribute to overall economic productivity. Productivity in the private



sector of the economy remains the result of effective and efficient provision of public goods and investment in public resources. However, the price mechanism does not allocate capital effectively and efficiently to public goods and services, because this requires *political* decision-making and policy practice to deliver investment to essential productivity needs. By insisting on both shrinking the state to a bare minimum set of functions and permitting only markets to allocate capital then the provision of essential public goods is no longer possible to the degree required by a complex twenty-first century socio-economic system. Simply relying on price cannot yield the appropriate allocation of capital because absent an adequate political allocation process the required pool of public capital will be deficient. An enlightened political process to allocate overall capital between private and public uses — cognizant of public and productivity needs — is obligatory.

### ***Neoliberalism and the Law***

A principal question of this chapter asks how has the law made corporations less susceptible to charges of responsibility. Typically, the direct argument against holding corporations morally responsible relies on neoliberal principles of limited government and non-interventionism. But there is another indirect but effective form of opposition that works through the legal system to assign only legal responsibility to individuals for harms and injuries that they cause as agents. This legal posture makes it difficult to raise questions about what corporations, not conventionally thought of as agents, ought to do or not do with respect to social, economic or moral duties and obligations.

It is commonly thought that corporations have gotten into difficulty with charges of moral responsibilities when individuals of the organization take unwarranted risks and are unwilling to accept responsibility for what they have done. But it can also be argued that inculcating individual risk aversion isn't the solution to the problem of aberrant corporate behavior. When corporations get into trouble for their destructive conduct, the diffusion of responsibility within an organization

makes it difficult to assign responsibility to the appropriate, culpable individuals. Legally it is also difficult to successfully bring charges against them.<sup>36</sup>.

There are several other problems with assigning responsibility that need to be considered. One is that the low visibility of those responsible (for decision-making within corporations) to those affected by corporate action makes the decision-makers less identifiable and thereby less vulnerable. By both physical distance and by social distance in a highly unequal society the officers and directors can remain largely invisible to the victims of corporate action. In a more nearly (socially) equal circumstance the more immediate proximity of corporate executives, officers and board members to those harmed can make those corporate individuals visibly identifiable and thereby curtail harmful action. Another way that those who should be culpable for corporate action escape from scrutiny is that others who are lower down the in the corporate hierarchy do the dirty work that results in injury and harm. Those higher up in the corporate hierarchy remain out of reach legally and morally. Also, the normalizing of aberrant corporate behavior over time has played a significant role in lowering collective standards of conduct. This promotes a more generalized societal shift from what is normative and generally acceptable to that which is merely legal and this shift has changed the standard of judgment for what can be admitted and accepted. When the only standard of normative acceptability is what is legally permissible and economically profitable then the inability of large corporations to admit errors for fear of a negative impact on share price becomes a perverted form of economic rationalism. And in an environment of extreme economic rationalism, individual rational agents are all there is and all that count. In such circumstances a corporate culture of concealment emerges to protect the guilty and so, not only is there risk aversion, but consequences aversion; those individuals responsible for policy decisions and management losses are not afflicted by exposure to blame and censure.

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<sup>36</sup>This aspect of culpability is covered in more detail Chapter 5-Responsibility

Deregulation, consolidation and removal of legal constraints creates a shield against corporate responsibility. Consolidation is another way of describing monopoly, near-monopoly or duopoly; things can be done in those circumstances that cannot in a genuinely competitive environment. Corporations are not democratic organizations; they are totalitarian in the sense that all power flows from the centralized top down, exactly what the neoliberals were concerned to prevent. To the extent that corporations have taken on governance roles in the political sphere neoliberalism has exchanged one form of totalitarianism (the state), with another (the corporation). And there is no need for enlightened corporate self-interest if there is no one with power below in the hierarchy to direct challenges to those above.

### **Neoliberalism and Corporate Moral Responsibility**

In Chapter 1 I said that I would argue for holding corporations responsible based on their status as non-agential intentional systems, but still consider them to be members of the moral community. There are conditions that are imposed by their incorporation, and their corporate chartering requirements, as well as civil law, that hold corporations legally responsible and treat the wrong-doing of corporations as the responsibility of the individual officers and board members, as well as of individual employees. Again, I have said that I am arguing that corporations considered as unitary entities are members of the moral community and can – on the grounds of conversability and other attributes of non-agential intentional systems – be held morally responsible. We are not obliged in law or normatively to restrict responsibility exclusively to individuals as natural persons. But neoliberalism, as the dominant socio-economic theory of our time, has an absolutist focus on individuals. By doing this, it implicitly gives certain protections to corporations.<sup>37</sup> However, it is also on corporations and not only individuals where assignments of responsibility of all kinds (legal,

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<sup>37</sup>It is difficult to prosecute and achieve meaningful legal judgments in cases of alleged corporate wrong-doing. But in cases where individuals of a corporation are charged, corporations frequently pay the monetary fines and other penalties of their officers who are found guilty and will often indemnify them for losses. The point here is that even if we restrict responsibility to its legal form, weaknesses and inadequacies are apparent.

social, and moral) should be focused because corporations are overwhelmingly the dominant organizational form of the twentieth and twenty-first centuries. Through this dominant position corporations arguably have not only unprecedented amounts of economic and political influence and control in contemporary global capitalism, but also unprecedented capacity to do wide-spread, long-lasting social and economic harm.

The desirability of a minimal state in Hayek's theory concludes in two consequences for corporate responsibility. One consequence is that the concept of the minimal state encourages legal restrictions on (or prohibition of) regulation of corporations, and this hands-off posture largely puts corporations out of reach as legally culpable unitary entities. The second consequence is that despite their status as legal fictions enjoying a variety of personhood rights corporations are considered to be only a collection of agreements among contracting individuals.<sup>38</sup> This perspective of the corporation as a collection of agreements among contracting individuals is known as the nexus-of-contracts theory.<sup>39</sup> Hayek's thinking about legal frameworks is derived from his concern with a minimal state, but to further address this here puts the story about Hayek's theory ahead of an understanding of where his thought developed from and how it was shaped by earlier neoliberal thinkers.

There is a connection between neoliberalism as a theory and our concern with corporate moral responsibility, and that concern centers on a contradiction. The socio-economic reality of everyday life as it is experienced by ordinary people suggests that the contradiction lies in something other than just the obvious mis-match of eighteenth century, classical liberal thought on which neoliberalism is based on the one hand and the global corporate socio-economic order in which we now live and work on the other hand. The contradiction is that claims about the economic efficiency

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<sup>38</sup>The concepts and complications of legal fictions, fictional entities and personhood are the subject of Chapter 3 below. The issues of legal fictions are developed and dealt with there in detail.

<sup>39</sup>Nexus-of-contracts theory is defined and explained in Chapter 3 Personhood.

of neoliberalism and claims about its political legitimacy do not seem harmonious. Neoliberalism, as I have described above, emerged as part of a reaction by European scholars and economists against the rise of totalitarian states that they had seen do so much damage in the interwar and world war period (1918- 1945). As it was further developed at several universities in the United States, most prominently at the University of Chicago where Milton Friedman was its best-known proponent, neoliberalism took a turn that hardened its oppositional character. It was during this stage of development that neoliberalism found its strongest expression in opposition to the New Deal and to the welfare state, as well as promoting privatization of public assets and deregulation of industry and the private sector. As I have indicated, it was not only against socialist and totalitarian regimes that the neoliberals aimed their attack, but it was in opposition to the state itself as they sought to minimize the role and size of government overall. Since 2008 in the aftermath of the GFC, and in the decade-long period of austerity that has followed the acute phase of the crisis, social and economic inequality has increased dramatically. Yet political opposition to any challenge to neoliberal theory and policy has only strengthened.

### **Conclusion — How Neoliberalism Makes Corporate Moral Responsibility Necessary**

Neoliberalism has been a successful theory and policy initiative. Its success can be measured by the extent to which it has become the standard story of how the socio-economic order works. Since its early beginnings in the 1920s and 1930s, neoliberalism has achieved its success through a well-developed networked organization, through corporate funding sources, and through the cultivation of contacts inside academia as well as an outside web of quasi-independent research and policy institutions. The results have been a dominant world-view based in economic theory that has been translated into political policy across much of the world. In this chapter I have argued against neoliberal theory and the policy practices that have been implemented following its tenets on the grounds that it is contradictory, based on faulty assumptions and leads to net economic and

social outcomes that are as problematic as those it purports to defend against. The question remains — how does neoliberalism make corporate moral responsibility necessary?

The first, central tenet of neoliberalism is individual absolutism. In the legal realm, the neoliberal concept of individualism is assimilated via the legal concept of personhood, enabling corporations to acquire rights, yet unlike natural persons, corporations can evade responsibilities. This is taken up in Chapter 3 on personhood. A second tenet of neoliberal theory is a minimal state. An adequately robust regulatory regime is unlikely in a minimal state, but not impossible. However, as it has been implemented under neoliberal “light touch” regulation, this policy has resulted in a weak environment for corporate oversight and public protection. The combination of powerful corporations with few regulatory checks, means that legal sanctions, while they exist, are an insufficient check on corporate wrong-doing. Thus, we need corporate moral (and not only legal and social) responsibility to fill the gap between corporate action and its consequences. Neoliberal thought has also shaped and constrained the philosophical debate about responsibility. In a similar manner, the dominance of individual absolutism has meant that philosophical arguments have sought to make corporations accountable as if they were (or could be redefined as) individual moral agents with intentions, not fully grappling with the implications of responsibilities of unitary corporate entities. This results in the need for a theory of specific corporate (not only individual) moral responsibility. These philosophical points are developed in Chapters 4 and 5 that follow on intention and responsibility.

## CHAPTER 3-PERSONHOOD

### Introduction

In the United States on 11 August 2011 the Republican candidate for the party nomination, Mitt Romney, addressed a crowd at the Iowa State Fair. In speaking of the problems of growth and cost of US entitlement programs (Medicare, Medicaid, and others) he stated that he was against raising taxes on individuals to meet the increased costs of these programs. A person (or several persons) in the crowd shouted "Corporations! Corporations!" The shouters were expressing their preference for raising taxes on corporations for the necessary monies to support these programs. In response to this heckling Romney said: "Corporations are people, my friend...". Critics in the crowd, demurring, shouted back that corporations are not persons. Romney retorted: "Of course they are. Everything corporations earn ultimately goes to people. Where do you think it goes?" The hecklers rejected his assertion by shouting that the money goes in corporate pockets (Elliot 2011).

Going any more deeply into the sharply polarised muddle of American politics may risk engaging in that dialogue of the deaf, a term by which US political discourse is now frequently described. Yet there seem to be serious philosophical misapprehensions on both Romney's and the hecklers' parts in this contentious episode, and they illuminate a central problem of this study. There is a challenge of bringing to what I will call the personhood puzzle some balance between the issues of the metaphysics of corporations (are they persons?) and the normative implications of treating them as persons.

Romney based his rejection of taxing corporations on his implicit perception of the metaphysics of corporations, that is, he understood (at some level) that corporate persons are individuals and taxpayers, just as natural persons are individuals and taxpayers. Romney's position was that no individual should be burdened with additional levies to pay for growth in entitlement programs.

Romney, although obviously confusing the personhood of the corporation with those natural persons into whose pockets corporate earnings go, was resting his argument on the ontological character of corporations. Thus, he exhibited a view that their essential nature is the ground on which he could refuse to condone taxing them. Further, it appeared that Romney held that once the metaphysical status of corporations as individuals is accepted, then the outcomes of their acts are acceptable too. Romney's metaphysical view stands in sharp contrast to the position of the hecklers.

The hecklers were more concerned with the retention of corporate earnings in corporate pockets which they perceive as against the public interest and thus the problem becomes one of normative ethics. That is, the hecklers' primary concern was with the course of light touch corporate taxation policy formulation leading to outcomes for which they blame the granting of legal personhood to corporations.

Romney was not hearing the discontent of the hecklers' concerns with social practices and socio-economic outcomes that the hecklers perceive as unjust and unfair. Denying that corporations are people in the same metaphysical sense as natural persons, the hecklers were expressing their concern with the right and wrong outcomes of corporate acts and how those outcomes trumped the ontological status of the corporation. But the hecklers' stance seems not to recognise the long historical reality and socio-economic utility of legal personhood that provides corporations with personality.

In contrast to what we may infer of Romney's stance, the hecklers were rejecting the notion that outcomes of corporate acts are necessarily socially beneficial. It appears also to be possible that a significant number in the Iowa crowd did not care very much about the ontological status of corporations as people, or even as technically legal persons, as long as they don't act contrary to the public interest. In all too many instances they apparently don't see the public interest being



served by corporations. Indeed, the crowd may view the acts of corporations as increasingly inimical to the public interest, as violations of human rights, as contrary to a common sense of fairness, as a distortion of democratic processes, and so on.

This is a growing difficulty for liberal democracy and leads us again toward the arena of legal personhood per se. It raises the issue in this dialogue between metaphysics and normative ethics of whether (1) the efficacy of legal personhood (corporate personality) can be properly understood in the context of basic legitimacy demands of liberal democracy and (2) if we can answer the question of whom are corporations designed to serve: employees, shareholders or society at large?

In Chapter 1 I asked if it might be possible to make an argument that would hold financial sector corporations morally responsible for the consequences of their actions. Here in Chapter 3 I will examine the central idea of personhood. Personhood is the concept that makes it possible for a corporation to claim, hold and exercise civil and constitutional rights. To more fully understand how corporations have been granted and exercise those rights we begin with their status as particular kinds of persons. It is on the basis of that status as particular kinds of persons that they are thought to be eligible to have rights at all. Yet even as we clarify the personhood issue, a puzzle remains. Why do corporations enjoy the accumulation of rights and privileges that come with personhood, but, under the currently dominant contemporary legal theory of the corporation, are they not understood as distinct, fully-fledged members of the moral community and thus susceptible to ascriptions of moral responsibility?

I first present a brief history of the concept of legal personhood. Following that I then describe deficiencies of jurisprudential interpretation and application of personhood with respect to legal remedies for the problem of corporate moral responsibility. Important questions about difficulties assigning moral responsibility to corporations as rights-bearing persons arise here. Finally, I will discuss alternatives to personhood-based responsibility and questions of whether agents and

agency are required for corporate moral responsibility.

The GFC is an illustration of financial sector corporations using personhood to exercise power and escape responsibility. A major part of the explanation for this is found in the concept of corporate personhood for it is through their possession of legal personhood that financial sector corporations have accumulated and exercised the power necessary to successfully claim rights yet avoid being held morally responsible for what they have done. The role of corporate personhood in the GFC is vitally important because confusion about the legal concept of personhood is one of the central means by which financial sector corporations have been able to exercise power without suffering the moral consequences when their practices result in widespread harm and injury.

I will show that there is a chain of relationships starting with corporate legal personhood to their acquisition and exercise of property and liberty rights and finally with their avoiding or evading responsibility. Those property and civil rights gained by corporations have resulted in their continuing accumulation of political power, something that affords them the capacity to influence and manipulate regulation and legislation through lobbying and financing of political campaigns. Corporations have captured regulatory mechanisms through free speech rights that give them extraordinary power to lobby, influence legislation and contribute financially to the election campaigns of political candidates and incumbents. Free speech rights and other liberty rights gained through personhood give them great advantages over ordinary individual citizens whose resources are no match for those of corporations in the political process, especially with respect to influencing the composition and effectiveness of regulation, oversight and sanctioning of wrongful corporate behaviour, particularly in the financial sector.

### **The History of Legal Personhood**

In what follows I will first present a literalist explanation of the consequences of theories of

corporations in historical sequence; this is the “what happened and when did it happen” view of legal personhood. After that I will move to a structuralist view—why did certain things happen and what followed from that? The shift to the structuralist interpretation is intended to help understand what happened but in a historical context. I want to focus on why these changes took place and follow the consequences in each instance and with each shift. Finally, I briefly present a third move from the legal theory and into the philosophical concept of personhood as an abstract concept.

One of the principal questions of this chapter is to ask whether the concept of legal personhood can help us to understand how moral responsibility might be ascribed to commercial corporations. Does this concern with corporate personhood contain a fundamental question? To answer this, I begin with the history of the concept of legal personhood. I will describe how personhood has had a significant influence on judicial decision-making in recent (mostly US) legal history and why personhood plays a crucial role in allowing corporations to avoid ascriptions of moral responsibility.<sup>40</sup> I am taking this approach because it is in the realm of the law that we find a connection between the relatively recent grant of legal corporate personhood to financial sector firms in particular and the capacity of those firms to effectively shield themselves from appropriate regulation of their practices, meaningful sanction for their wrongdoing and authentic forms of responsibility for the consequences of their action as they function in the world. The moral and normative implications that follow from the legal history of theories of the firm are where my emphasis will concentrate, but to do that I first need to set the groundwork for development of the legal theories of the firm that play an important role in what seems to be immunity from legal, economic, social and especially moral responsibility for financial sector corporations.<sup>41</sup>

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<sup>40</sup>Debates about personhood and the nature of corporations are prevalent throughout Anglo-American law. Although this chapter employs examples mainly from the history of US legal theory, the concerns attached to personhood are co-extensive across the Anglo-American sphere. It would be difficult to argue that the consequences of the treatment of corporations in US law and judicial decision-making are not felt globally.

<sup>41</sup>There is a vast journalistic literature about successful avoidance and evasion of responsibility for the GFC by financial sector corporations and their principals. For example, see Jed S. Rakoff (United States District Judge for the Southern

Traditionally it is the question of what corporations are, what is their nature and what purposes they have that has occupied the thoughts of those concerned with the consequences of corporate action. The approach I am taking looks first at how theories of the corporation have developed and changed over the past 150 years, i.e., the course of understanding of their nature and purposes. It is not necessary to reach deeply into ancient and medieval thought about personhood to understand sufficiently the contemporary problem with corporate personhood in the context of these theories. But this earlier thought does indicate the origin of the concept and how it informs and shapes contemporary legal theory and social practice, and more importantly, how we get to the normative consequences for the firms and those who enjoy and suffer from their actions today. In this historical overview I rely on an article by David Millon (Millon 1990, p. 1033). Rather than getting bogged down in an extensive historical survey I present a condensation of Millon's summary of recent corporate law. Millon's article covers only the last 150 years in US legal history of theories of corporations. Millon's history is important because it allows us to understand the basis of central issues in modern corporate law with respect to personhood, corporations, their entity status and how they have developed.

From their early formation as obligation-bearing entities corporations have evolved to an extent that they are among our most influential and powerful social institutions, challenging states and all other forms of social organization for dominance (Krannich 2005, pp. 64–65). The features of limited liability for participants in the corporation, their influence within the markets where they trade, as well as their capacity to function as engines of capital accumulation, put corporations among our most highly developed and important socio-economic institutions. The use of fungible equity shares for ownership, and relationships as parties to binding contracts puts them at, or very close to, the center of all human activities, economic and otherwise. While the development of

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District of New York) (Rakoff 2014).

corporate institutions and activities is not a new historical phenomenon, its roots go much deeper than is commonly thought.

In our time, corporate activities rest on the abstract concept of personhood, but it is an ancient concept having its foundation in the Roman *societas publicanorum* (“society of publicans”) dating back to the fifth century BCE. Publicans were leaseholders functioning as contractors to fulfil a wide variety of business activities on behalf of the government of the Roman Republic including services, supplies, property and revenue collection. It is from these leaseholder groups that the abstract concept of personhood derives. Thus, the reality is that the history of corporations did not begin in the seventeenth century as is commonly attributed to legal grants by the state to the East India Company (a joint-stock English company), or with the French and Dutch companies of the same period, but two thousand years earlier.

Three common and fundamental features of corporations are especially salient to a proper understanding as we trace the history of corporate personhood. One is that their existence is not affected by the departure of individual participants; this enhances organizational stability. Second, corporations can be represented by designated members, so there is one body or central representative through which all activities occur; the corporation thereby becomes the bearer of all obligations. Third, there is separation of ownership and management. This separation makes getting financial and human capital easier, but it does not involve management in the provision of capital. Fungibility (transferability) of share ownership reduces the problem of misaligned incentives between managers and shareholders. Ownership is fungible through the buying and selling of shares of stock in the entity (Malmendier 2005, p. 31). However salient they may be to a proper understanding of their development since their early emergence in the history of corporate groups, these features do not add up to corporate personality.

During the period of the Roman Republic, a *societas*, formed by a group for a common purpose, had

four criteria: contributions of the partners to the enterprise, a common interest, an aim for the business and the intention or will to form the *societas*. A *societas* as a form of organization did not create a distinct personality. In contrast to what was needed at the time by the Republic and, in comparison to modern corporations, a *societas* appears seriously deficient. For example, profits and losses were shared equally among the participants and liability was not limited. However, the Roman Republic, due to its need for corporate organizations to carry on the activities of the Republic, acknowledged as necessary the development of special rules to give to *societas publicanori* a kind of corporate standing, and it is a standing that would be recognized today (Malmendier 2009). This standing includes permanence of the entity after the death of its founders, the right of representation, and shareholder ownership through fungible shares, the three features I mentioned above.

There is an important distinction to be noted between *societas* and *societas publicani*. The *societas* did not constitute discrete persons, but the concessionary special rules provided by the Republic, and which applied only to the *societas publicani*, gave them the equivalent personality of what we would today recognize as a corporation. This status included permanence, the right of representation and the capacity for ownership through shareholding, but most importantly, it established the concept of personhood.

Companies of publicans are recorded by Livy in *Ab Urbe Condita* in 216 BCE. There was rapid growth in the lease system after Rome's victory in the Punic Wars (ended 146 BCE). Leases were taken over by equites, the class of knights (one of the property-based classes of ancient Rome, ranking below the senatorial class) already the majority of publicanai. These reached their peak of political and economic power in the last decades of the Roman Republic. As the Republic declined legal reforms restricted the activities of the equites and without government support the *societas publicanorum* fell into insignificance.

It is evident that important tasks were given to the publicani and this indicates that as corporate persons they and the contracting system were well-developed and reliable during the Roman Republic (Malmendier 2005, pp. 32–33). This and the regime of special rules established the concept of corporate personhood based on the features of permanence, representation and limited-liability shareholder ownership as well as the capacity for making binding contracts, engaging in legal actions, and collective decision-making on behalf of the interests and aims of the entity as a whole.

While this description may seem clear enough with respect to the establishment of corporate personality, it is only the beginning of the ambiguity, confusion and opaqueness about the concept of personhood and its application to corporations that has led to the problems we face today as we contend with corporations in philosophy and jurisprudence. Disputes about the understanding of, and conflicts of interpretation about legal personality, and hence the nature and purpose of corporations, have persisted over the centuries. In two review articles from *The Journal of Roman Studies* David Daube engages in detail the history of legal personality expounded by P.W. Duff in his *Personality in Roman Private Law* (Duff 1938), (Daube 1943), (Daube 1944).

Daube notes that Duff shows Roman law never had a technical term for ‘legal person’ or for ‘legal personality’, but that it was true that in the Byzantine period the term *persona* might be interpreted as an entity qualified “‘to conduct a lawsuit’” (Daube 1943, p. 87). According to Daube, Duff concludes that a modern lawyer might learn very little from the Romans about the concept of legal personality. In the four modern German theories of corporate groups cited by Duff there is little support for a definitive statement of juristic personhood precisely because the Romans had no such doctrine.<sup>42</sup> During the classical period of the Roman Republic a concession from the state was

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<sup>42</sup>The four German legal theories of the corporation are: Savigny’s Fictionism, in which non-human entities have personality only if the law contrives the entity juridically to be a fictitious person; Gierke’s Realism in which organized groups form real persons; Ihering’s Symbolism, which holds that any entity other than a person cannot have personality; Brinz’s Purpose Theory, in which the property of a corporation is dedicated to a specific purpose, but no entity can have per-

necessary to create a corporation, but this was not because the Republic adhered to a fiction theory of the firm, rather, it was a means by which control of entities operating in and on behalf of the Republic could be maintained.

The result of Duff's scholarship reveals that although the foundation of this abstract legal theory is a meagre thing, the Roman lawyers made good use of it. "...[T]here is, thus Mr. Duff ends up, a moral to be drawn from this very lack of a system: the moral that 'in a peaceful and law-abiding community a well-trained, intelligent and practical race of lawyers can build a very strong and effective structure of legal rules and legal administration on a very slender foundation of abstract legal theory'" (Duff 1938, p. 236). Daube concludes that Duff is correct in arguing that legal personality cannot be properly traced back to the Romans via any of the modern doctrines. Despite the lack of a technical term to designate a legal person or by which corporate personality might be identified it appears that the evidence shows a functional corporate person in the form of the *societas publicanum*, but not a literal definition in Roman law supporting a technical specification of legal personhood. In light of these conflicting positions I will assert that the consequence of Roman practice provides a practical form of personhood that conforms to the claim that Republican corporate entities had the functional equivalence of corporate personality.

### ***The Early Medieval Period***

Current debates about personhood in Anglo-American law can be traced through the period between the ancient thought and practice of the Roman Republic into the present. One aim in this chapter is to reveal the sustained thread of development of the personhood concept that reaches back to the ancients and connects to our present problems. It is tempting to further illuminate some of the countless questions that are raised by developments in the medieval period because

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sonality if it is not human, yet the property of the corporation is not the possession of any one person (Daube 1944, p. 132).



they are central to understanding the myriad twists and turns taken in its extensive legal, social and political thought and literature. However, here my focus must be constrained to the much narrower range of legal and philosophical issues. From the ancient Roman conceptualization of personhood, the next significant legal shift is found in the early medieval legal history of England.

From the period of dominance enjoyed by the Church a transition occurred in Europe and England. There was extensive development of trade, sea-faring exploration, commerce and the socio-economic expansion throughout the Middle Ages. As states began to grow and commercial activities increased during the 12th and 13th centuries and onward, economic life became more secularized and urbanized. The integrated roles of the Church and the state were separated as they contended for power in the period when the state began to assert itself as increasingly independent of Rome and the power of the Church. The influence of spiritual authorities waned during this period and the Church began, albeit slowly, to lose its grip on political power. The head of the Church of Rome could no longer fill what might be a long temporal gap between the loss of a head of state and a Church-sanctioned crowning of the next monarch. Secular authorities needed a way to ensure the smooth functioning of state activities during the interregnum between when heads of states died and were replaced.

As the exclusive power of crowning of kings slipped away from the Church and the secular power of the state rose, the requirement of continuity and permanency became a more tangible legal and political necessity. In the early period prior to the 13th century the conflict between the state as a rising power and the waning of the dominance of the Church drove the legal and political question of royal personhood toward a construction of the King and his body as separate and distinguishable. Changes in the economic, commercial and social life of countries demanded a new practice to secure the permanency of state functions required by those changes. In the time around the 13th century the Crown was not a "fictitious person", but an organic whole. It did not exist as a thing

separate and distinct from its members, and so the state did not exist as a “superior” being. It may have been “bodified”, but it was not discretely “personified” (Kantorowicz 1957, p. 270). While the state might be thought of as a “corpus”, and hence a sense might be gained of the King’s two bodies, it is not a “persona”, and thus not the king’s two persons (Kantorowicz 1957, p. 271).

During this time of conflict between the empire (the Crown) and the papacy and between rising secular powers and declining influence of the spiritual powers another transformation was also occurring, but on a much larger scale. A historical change in humanity’s relation to time, in which something that had been stable—the idea that time was a finite span between the Creation and a Last Day at the end of time—became something unstable, a sense that time was infinite. By the end of the Middle Ages Western thought was transformed through the emergence of the idea that infinite time could allow the possibility of unlimited progress. In this radically transformed world there were practical needs of kingdoms, communities and public institutions for continuity over time as well as the perpetuity of the Crown’s need to meet its budgetary requirements. These requirements—budgets, taxation and other government practices produced a need for a legal fiction to accommodate an endless continuity of the body politic. In this was the making of an immortal fiction, the state in perpetuity, but with a mortal head, the king (Kantorowicz 1957, pp. 274–275), (Kantorowicz 1957, pp. 284–291). It also became apparent that the relationship between the person and the office of the head of state, the two roles in the one person of the human king, needed supplementation by a legal fiction of the King as the representative of the Crown to provide the necessary stability. But at the same time, Kingship itself began to disintegrate as the fiction of the Crown began to be replaced by the corporate body of the people.

The King then became a corporate fiction such that the death of the king would not compromise the continuity of the state. This provided a solution to the reality that the king’s corporeal body may die, but the state must continue. The solution was to be found in a fiction that the King could

represent the ever-lasting state, but the king still be acknowledged as a transient mortal being. This provided the continuity necessary for a polity-centered rulership (Kantorowicz 1957, p. 272). Again, the essential issue was that the death of a king would render the body corporate (the state) incapable of action due to its incompleteness in the event of the king's demise.<sup>43</sup> This then, is an early version of corporate personhood in medieval England when the legal fiction of the crown is construed as a "corporation sole." Establishing the role of the king as a separate entity distinct from the mortal individual who wore the crown distinguished the perpetual royal entity from the temporal person. And as the perpetual royal entity had begun to deteriorate, this established a corporate person with continuity and an essential character that was independent of the human occupant in the role and thus the King was unrelated to that of the king, its temporary inhabitant.

### ***The Late Medieval Period***

The legal and political concerns in the early English medieval period are conceptually and politically distinct from those of the later period. In the later medieval period of the 14th and 15th centuries the ideas about medieval legal personhood resulted from the jurisdictional pluralism characteristic of England at the time. In this period, there were conflicts between the royal legal courts and those of the Church with respect to personhood. The resulting definitions of personhood centered around the formation of legal persons from a variety of selves as those selves were defined by the practices of the many different courts in which cases might be heard. In turn, the practices of the courts produced a kind of person, just as that person produced the law. In practical terms, personhood was related not only to social class, that is, the courts to which individuals of different classes had access defined personhood differently, but also how the courts handled and defined both the actions and those who brought them to be adjudicated. For example, in common law jurisdictions actions brought over real property produced certain kinds of outcomes and set

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<sup>43</sup>A comprehensive treatment of this issue is found in Chapter VI, "On Continuity and Corporations" and Chapter VII, "The King Never Dies" in Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*.

precedents that were influential for canon law courts in which the state of the participants' souls and other spiritual and theological matters were at issue. Conversely, the ecclesiastical courts and their deliberations about matters of faith, conscience and morality had an effect on the common law and the courts that heard those cases.

What emerges from these jurisdictional conflicts is personhood in two aspects: an inner aspect having to do with the affect, soul, morality and reasoning and an outer aspect having to do with the physical body and property. In this second, outer sense, property became an addition to, or elaboration of personhood (Boboc 2015, pp. 12–13). This aspect of the outer form of personhood becomes important to corporate, artificial personhood in the early modern period that followed. It is in this late medieval period of conflict among jurisdictions that the definition of the personhood of legal entities determined whether a natural person had standing to bring a specific cause of action to a court. From this array of English courts no coherent body of law on legal persons issued. Although clearly legal persons were a subset of social persons it bears emphasizing that in medieval law, persons had legal standing based on how they were perceived as social beings by their community. This was a reputational matter, and by belonging to both a social and a legal category, plaintiffs and defendants were treated accordingly by the courts. In this way the law of persons both determined and was determined by social personhood.

During the middle ages life for most people was marked by feudal attachments, characterized by duty and debt to their community, their family and to the Church. Following the Reformation, the ensuing profound transformation of spiritual and secular relations brought an individualistic turn and a different pattern of relationships in which personhood and identity became rooted in individual conscience and subjective intention. This fundamental change in the social, economic and political order was instrumental in creating the modern autonomous legal subject. Of course, there were gradations of personhood as I have indicated above with regard to social evaluations of

persons by the community. But I have also indicated that there are gradations of legal personhood ranging from the King's persona, to feudal subjects tied to land and the social hierarchy to the sovereign autonomous individual that emerged following the Reformation. These conceptualizations of personhood are transformed once more in the early modern period of English law as the legal fiction concept is applied to the corporation. By extension, personhood was extended from natural persons to artificial persons for economic reasons having to do with the further development of commercial society and global activities of nation-states. It is from the early modern period of English law that the concept of the artificial person leads to the autonomous legal fictions that are so contentious today. From concepts of persons as a way of defining social and economic roles there is a trajectory of legal development to ideas of persons as a method of ordering social relations, not with the stability of the middle ages, but now with the instability and artificiality of legal personhood.

### ***The Early Modern English Period***

I have tried in the material above to describe how the early medieval period can be characterized with respect to personhood as a conflict between the Church and emerging secular states separate and distinct from Rome and their need for continuity, and establishment of a personified body politic. The second, late medieval period, can be characterized as a conflict among legal jurisdictions for defining the relationship between the state and the developing concept of inner and outer personhood. In the context of jurisdictional pluralism in England persons were variously defined based on their social class position, reputation and the nature of the courts before which their cases were heard. The succeeding period in England, the early modern, can then further be characterized as a conflict between ideas about whether the law was to be seen as an artificial construct, as something autonomous and having to do with property and other rights and little or nothing to do with morality, or whether the law was inherently woven together with moral and

ethical concerns of right and wrong (Boboc 2015, p. 13). This set the conditions for further conflict during this period between the state and the legal instruments that granted certain rights and privileges to artificial persons to undertake projects ostensibly aimed at furthering the common good. It was a “...protean concept of the legal personhood formulated at a time when the English legal culture went through a critical period, developing from a nascent, sometimes-experimental legal system into the sprawling, vigorous early modern legal culture that would provide the foundation for English colonialism in the New World.” (Boboc 2015, p. 4).

In the 18th century when we encounter the beginnings of modern corporations that we recognize today the law in England was first comprehensively described by William Blackstone in his *Commentaries on the Laws of England* (Blackstone 1765). Blackstone explained that corporations were legal persons, artificial in nature, and created “for the advancement of religion, of learning, and of commerce” (Blackstone 1765, p. 127). The aim of the law in Blackstone’s view was for the state to create artificial persons and grant them rights to facilitate the formation of particular kinds of groups to accomplish ends with specific social utility. Later in the 18th century, Stewart Kyd, the author of the first treatise on corporate law in English, defined corporations as collections of individuals formed as one artificial body but capable of a perpetual existence, with the capacity of acting as if it were an individual. These entities could own property, be parties to contracts incurring legal obligations, and have standing to bring and be vulnerable to legal actions as well as enjoy privileges and protections, and exercise an array of political rights, according to the powers specifically granted by the state (Kyd 1793). Later in the 18th century in the United States an understanding of a corporation as an artificial legal person was already affirmed by the founders. In *Federalist Eight* (of the *Federalist Papers*) Alexander Hamilton’s *Opinion on the Constitutionality of a National Bank* declared that to “...erect a corporation is to substitute a legal or artificial to a natural person” (Hamilton 1791, pp. 97–106).

Similarly, in a case stemming from a contract dispute over whether the charter of Dartmouth College could be changed by the state of New Hampshire to make it a public institution, the Supreme Court of the US ruled (*Dartmouth College v. Woodward*, 17 U. S. 518, 1819) that although the King of England had granted a charter to its trustees in 1791 making the college private there were limits on the powers of the state to change contracts. Chief Justice John Marshall described in the majority opinion that a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law” had rights that the state must respect.

These two cases illustrate that as state-created fictions corporations already had by this time standing as juristic persons that was well-established. Enabled by this status, the word “person,” applied to corporations in a legal context was uncontroversial. The Dictionary Act of 1871 passed by the Congress of the US set the rules for interpretation of federal laws, and by these rules Title 1 of the United States Code, (12 1 U.S.C. § 1 (2012)) states explicitly that “unless the context indicates otherwise” the “words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” (Barnet 2014). Yet the confusion and indeterminate nature of corporations as persons persists. In US law, there is a trail of interpretation that reveals this persistent lack of clarity and consensus about the nature, purpose and social practices of corporations.

### **US Legal Theories of the Corporation**

In this chapter I have been tracing the way that the concept of personhood has been conceived in the law over time. My aim is to understand how corporations, through being defined as particular kinds of legal things, have gained rights and yet managed to escape meaningful assignments of moral responsibility. What I want to show is that this results from a contemporary legal theory in which corporations are said to be the very things that cannot be assigned responsibility. According to this definition of them as abstractions, i.e., as legally constructed fictions, and yet even as they

bear legal rights and duties, corporations must not, it is held, be mistakenly conceived of as members of the moral community. According to the dominant legal theory of the corporation, they cannot be held to be real or natural persons and thus capable of bearing responsibility, notwithstanding their possession and accumulation of rights. A brief review of the succession of legal theories of the corporation, as those theories have developed in the US, will help to reveal how this has happened.

For this review, I return to the article by David Millon (Millon 1990). There are four parts to Millon's essay: an introduction setting the basic question of the nature of a corporation and how theories of the corporation have developed and changed over the past 150 years. This is followed by a survey of the four principal theories of corporations, then a statement of the significance of each theory and finally, a short discussion of the private-public nature of corporate law and how we might address public interest in corporate action that does not depend on the entity/aggregate, natural/artificial nature of corporations. I will follow Millon's format because it addresses the essential conceptual issues and is succinctly stated.

According to Millon there are two dimensions to our understanding of what a corporation is: there is one distinction between the corporation as an entity, conceived as something that has a real existence separate from its constituent shareholders and other participants, and the corporation conceived as an aggregate of natural individuals. In the aggregate conception, the corporation does not have a separate existence, except that it exists legally, that is, in name only. The second distinction is that between the corporation as an artificial creation of the state and the corporation as a natural product of private initiative (Millon 1990, p. 201). These distinctions that have been combined in different ways at different stages of development of corporate law in the 150 years are of concern to Millon.

### ***Theories of the Corporation in American Legal History in the 19th Century***



There are three periods of development of the theory of corporations in the 19th century. In the early 19th century legal attributes of incorporation as artificial entities created by the state encouraged conceiving of the corporation as an entity existing separately from its shareholders and other participants. With respect to the body created by law, the corporation could be viewed as a legal person with a separate existence from the aggregation of shareholders owning and controlling it (Millon 1990, p. 206). The corporate entity was considered artificial because it owed its existence to the positive law of the state rather than the private initiative of individuals. In the period during the middle of the 19th century each instance of incorporation required a separate act of a legislature. This legislative procedure was replaced in the latter part of the century with laws of general incorporation. This standardized the incorporation process with routinized filing procedures and regulations, but the grant of charter by the state reinforced the artificial nature of the corporation as a creature of the state. It made explicit that a corporation was chartered to pursue a declared public purpose or the general welfare.

In contrast, incorporation for the pursuit of private goals by corporations and their investors created suspicion and hostility not only because it connoted special privilege but also because their financial and other resources threatened the economic balance of power between corporations and the rest of society. Hence, during this period there was a regulatory effort with respect to the relationship between the corporation and the rest of society.

Despite this regulation, the public perception of grants of incorporation was one of political favouritism because they appeared to offer opportunities to corporations for accumulation of economic and financial resources no other entity could gather and could be used for further narrow, self-interested corporate political purposes and against the public interest. The response in the latter half of the 19th century to these perceptions was to provide another method of incorporation through procedurally simpler and more general laws that eliminated the approval of

the legislature for grants of corporate status.

In the last third of the 19th century there was a change to general incorporation statutes. General incorporation laws not only offered easily available means for incorporation but were thought to prevent monopolies through competition among many corporations competing in the same markets, as well as imposing regulations on their purpose and powers. These measures were accompanied by setting limits on both capitalization and the lifespan of the firm. By the last years of the 19th century US state legislatures further lifted restrictions on corporate ownership of stock in other companies. This allowed holding companies to emerge, as well as eliminating capitalization limitations. US courts in the period of the 19th century progressively diminished the grant or concession theory of corporate power whereby corporations could exercise only the specific powers granted to them by the state under the artificial theory of the firm. The consequence was that corporations grew to a much greater size and power than had previously been possible (Millon 1990, p. 208).

The primary public policy justification for incorporation throughout the 19th century was realizing the utility of a “socially useful instrument of economic growth” (Millon 1990, p. 207). Constraints on corporate power and limitations to their defined purpose were indications of the enduring distrust of corporations. The legal doctrine of *ultra vires*, a legal principle that disallowed a corporation from entering contracts not specifically defined in its charter, was a way for the state to prevent shareholders from expanding the powers of a corporation beyond those explicitly granted by the state. States also prevented corporations from acting as holding companies, in which they owned the stock of other companies in a parent-subsidary role (Millon 1990, p. 209). The safeguards of state regulation reflected the idea of the corporation as a state-created artificial entity and the state’s role in managing the relationship between corporations and protection of the public good. The end of the 19th century saw the natural entity theory become dominant and displace the

artificial theory of the corporation. During most of the 19th century the corporation had been an artificial entity in legal discourse. The natural entity theory perceived corporations as distinct things created by the state for specific purposes, and not merely as aggregates of individuals. In this form there was an emphasis on the constitutive role by the state of the corporation. Through their creation by the state as a matter of corporate law there was an implied justification of a public rather than a private law approach to the legal status of the corporation. This also imposed state-sanctioned regulations on corporations as a safeguard that significant public concerns were not neglected.

By the end of this century there was also a decline in the use of chartering by authority of the state and a rise of the aggregate theory, i.e., corporations conceived of as aggregations of private individuals analogous to partnerships. Theorists pursued an anti-regulatory conception of corporate law to protect financial interests of shareholders from restrictions on property rights. At this stage the aggregate theory did not prevail, but the idea of corporations as a natural creation of private initiative and market forces replaced the idea of corporations as artificial state creations given concessionary grants. Natural entity theory was then interpreted to imply the same private law, anti-regulatory shareholder-centered view of the aggregate theorists. This legitimated big business in the early 20th century.

To summarize, the 19th century in the US was marked by three distinct periods of the corporate form. In the early part of the 19th century corporations were created as legal persons by the state as artificial entities with specified aims and obligations. They were distinct entities regulated by the state. In the middle of the 19th century legislatures created every corporation as a separate and distinct entity with a public purpose, but the cumbersomeness of the process and realities of rapid economic growth dictated a faster facilitation of incorporation. The artificiality of the corporation was reinforced by the nature of its creation through state charters. At the end of the 19th century

faster and easier incorporation facilitated economic development and a transition began from the state chartering of corporations to another theoretical position, that of the natural entity.

### ***Theories of the Corporation in American Legal History in the 20th Century***

In the early years of the 20th century the artificial entity theory gave way to a new idea. A new conception of the corporation as a product of private, individual initiative with the powers of its individual constituent shareholders caused a re-evaluation of the relationship between the state and the corporation, as well as that between the corporation and its shareholders. This led to the triumph of the natural entity theory (Millon 1990, p. 211).

Understood as natural entities, corporations were no longer seen as susceptible to regulatory efforts by states as they once were. They were now perceived as constituted of private individual shareholders and subject to market forces capable of constraining them from excessive use of their concentrated economic power. Preventing corporate domination of economic and political life through market forces appeared as a rational practicality. In this natural entity scenario there was an absorption of corporate persons into a conceptual equivalent of natural persons. However, the dominance of natural entity theory in the early part of the 20th century proved to be temporary.

A few years after the stock market crash of 1929 and the onset of the Great Depression in the early 1930s, the next theoretical development saw proponents of shareholder interests shift from consideration of the firm as a separate, distinct natural entity resembling a natural person toward a concept of the corporation as an aggregate, conceived in partnership terms. This took the idea of the firm further away from first the artificial, and then the natural entity bases of corporate existence to one grounded solely in the property rights of the shareholders. This shift marked a departure from the mystical “legal person” conception of the corporation to the actual human beings that composed it and whose property rights were at stake. In conjunction with the

unprecedented growth in the size and power of corporations and the very significant problems of the Great Depression, questions arose about whether assignments of corporate citizenship and social responsibility had potential to deal with the causative roles corporations were perceived to play in economic, financial and social issues. The answer to the possibility of corporate citizenship claims was provided by Adolf Berle and Gardiner Means in their book, *The Modern Corporation and Private Property*, that had a great and lasting influence (Berle and Means 1991 (1968)). In this volume Berle and Means argued that corporations must pursue the maximization of shareholder value which reflected the widespread share ownership in corporations and led as well to delegation of management responsibility to a small group of professional managers. There was a consequence to the divergence of the interests of managers and owners: a separation of management interests (their own enhanced power) from shareholder interests (maximum shareholder value). But there is an inherent accountability problem—how could shareholders be assured that management would act in shareholders' interests? Berle and Means saw management's role as one of acting as trustees for shareholders (Millon 1990, p. 222). They concluded that the property and trust idea would compel the managers to act for the benefit of the shareholders as trustees. In this theory management is prohibited from activities that are not aimed at maximizing shareholder value. The emergent problem of separable management interests and shareholder interests became the central issue in corporate law. The view of Berle and Means was of the corporation as an aggregate, not as a distinct entity, hence there is no person and no personhood to be addressed with respect to issue of responsibility for corporate action. Instead, there are only the shareholders and management to whom to look for relevant actors in corporate action and its consequences. Furthermore, the concept of shareholder primacy rejected any notion of management's power to engage in socially responsive activities. While the shareholder primacy theory rejected corporate social responsibility it also rejected legal regulation as unjustifiable (Millon 1990, p. 223). Thus, shareholder primacy as an aggregate corporate theory is a private law conceptualization. Since this

time, shareholder primacy has been dominant in corporate law and as the orthodox theory it is the standard response to corporate social responsibility arguments.

In the last transition to what is sometimes referred to as the “new economic theory”, the nexus-of-contracts model emerged in the late 20th century (circa 1980) based on neoclassical economic theory. A corporation, in this nexus-of-contracts theory, is understood as an aggregate, as shareholder-centered and subject to private corporate law, but not subject to government regulation. The principal theorist of nexus-of-contracts is Ronald Coase (Coase 1937). The central idea is that firms exist because intra-firm transaction costs are lower than would be the case if the same activities were coordinated through the market. Coase focused on the actors rather than reification of the firm as a particular kind of entity. Some nexus-of-contracts theorists differ from Coase because they reject the concept of shareholders as owners and see them as simply a supplier of inputs (capital).<sup>44</sup> Shareholder rights are determined by relations among contracts. Thus, a corporation is nothing more than the sum of contracts among input suppliers to the corporation and cannot be an entity in its own right. There is such a thing as the corporation, but there is no person-entity. The corporation exists in name only as a legal representation of the interests of the participants. This brings us to the present day. The significance of the theories of the corporation I have sketched is that historically they have played two roles: (1) legitimization of the law of corporations and how that law interprets corporate activities, and (2) as determinant with respect to the normative implications that follow from corporate action and social practices.

The law is said to legitimate a certain kind of treatment of corporate activity and the consequences that follow from that activity. However, it is not possible to give a simple and straightforward account of the legitimating aspects of corporate theory because the history of the development of legal theory of corporations does not reveal a simple and direct relationship between corporate

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<sup>44</sup>The literature extending and critiquing Coase’s work is extensive. See, for example, Jensen and Meckling (1976), and Eisenberg (1998).

theory, legal rules and social responses. The normative implications that derive from corporate legal theory have their genesis in the positive assertions made about what corporations are. These assertions are the product of legal doctrine, the rules by which judicial decisions are made, and find expression in corporate theory. The relationship is complex and dynamic. As the economy and the corporate form interact over time and each one influences the other developmentally, corporate doctrine and theory evolve to meet changes in practical activity. The same holds true for the relationship between corporate theory and social practice. If the corporation is asserted as an aggregate entity, then an anti-regulatory, private law approach follows with respect to corporate action, treating it as nothing more than the constituent participants of which it is formed. If the corporation is asserted to be an artificial entity, then as a creature of the state the corporation is considered to be subject to state regulation within a public law framework and as something separate and distinct from its participants. However, the degree to which normative determinations about the nature, purpose and functions of corporations follow from the positive descriptions in corporate theory is contested. In broad outline, the sketches here provide a sufficient grounding to understand the source of legitimacy for normative interpretations of corporate action under these two principal theoretical views. There is also a fundamental indeterminacy of legal theory. It stems from the communal understanding that is the source of its objectivity and by that account is historicist with respect to determination of the theory's meaning. This makes any theory or legal concept susceptible to revisionism anytime an interpretive community finds it appropriate. The only constraints on this revisionism are the community's own beliefs rather than a transcendental ahistorical source for its determinate quality. At its root, a theory of the corporation is determined by the interpretive community, something that changes and adapts to historical development and to the socio-economic and political context in which corporations operate. Because the normative implications of a corporate legal theory follow the interpretation of the community, as theories fall into and out of favour, so do the consequences of corporate action and its consequences.

Acceptability of any given theory of the corporation is contestable as are its normative implications (Millon 1990, p. 248). Legal theories are not determinant in the sense of mandating only one normative interpretation. This attribute makes the acceptability of any theory contestable.

In this chapter I am making a connection between legal theories of corporations, and the concept of personhood inherent (or not) in those theories. Millon's focus is on theories of corporations, not personhood itself. My focus is on personhood, the connection of that concept with theories of the firm and the normative issues that follow from the application of those theories in practical contexts. The theories and how they are developed and argued by academics can usefully be contrasted to how those theories find application in the courts and the normative consequences of the judgements that are handed down from the bench. Academic theories and judicial interpretations may be very different and judges may reject, strictly employ, or mix theories together even in the same opinion they write on a case before them.<sup>45</sup> This reflects uncertainty. Among legal practitioners the uncertainty is not just about the theories themselves, but about the implications of interpreting and deciding about the nature, purposes and practices of corporations. Not only can different theories yield different moral implications about what corporations are, what they are for and their social practices, but different interpretations of a single theory can produce different judicial outcomes. In an individual case there may be an issue of adjudicating among various theories as well as adjudicating about a particular theory. Rather than taking sides about issues of the nature of the corporation, personhood of juristic entities, and the normative implications of choosing one theory over another, judges driven by theoretical and practical uncertainty may choose not to use a theory at all. There is good reason for them to do this, but this has obvious consequences for the possibility of holding corporations responsible for what they do.

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<sup>45</sup> Avi-Yonah cites a case decided by the Supreme Court (*Hale v. Henkel*, 201 US 43 69-70 (1906)) in which all three theories of the corporation were employed. The case involved the Fourth and Fifth Amendments and took a real entity position on the corporate entity itself, an artificial entity posture to justify regulation by the state and an aggregate stance on corporate Fourth Amendments rights (Avi-Yonah 2017, pp. 32–33).



### **Indeterminacy of Corporate Law with Respect to Corporate Theory**

In judicial decision-making there is the need for a congruence between legal theory and legal doctrine as well as justification for the choice of one legal theory over another. The correspondence between a specific legal theory and the practicalities of doctrine, i.e., the application to concrete cases, is confounded by difficulties in selecting among the theories that might apply to a case. Depending on a number of variables, a case can be addressed by more than one theory and there is no consensus about which theory ought to be preferred. Consequently, judges are reluctant to embrace particular theories in individual cases. In the currently dominant theory of the firm, which sees shareholders as owners with property rights in a firm, there may still be judicial doubts about the correct fit between a theory and the particulars of a specific case. In such cases the court will intentionally leave undecided questions about an appropriate theory to apply due to a lack of clarity about the implications as well as the congruence between theory and the case at issue (Gold 2012, pp. 1089–1091).

### ***The Business Judgement Rule***

When courts are uncertain they avoid deciding on a theory and rely on other methods. The business judgement rule offers a way to avoid declarative statements and also avoids taking a position on personhood when courts are confronted with having to make decisions in concrete cases. The rule is that it is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company” (Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).<sup>46</sup> Using the business judgement rule permits the courts to continue to function in spite of not working through a full theorization of the problems of cases. This means for the courts that uncertainty and indeterminacy have a real and practical utility. This is important considering that courts have to contend with how

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<sup>46</sup>As cited by Gold (2012, 1093).

legal theories of corporations might apply to different types of corporations, different moments in economic history, the state of development of a corporation, vagueness in the law, differing social norms and jurisdictional differences (Gold 2012, p. 1096). It is simply too time-consuming and far too expensive for courts to wait for debate and the evolution of theory to resolve cases.

### ***Ambiguity Regarding Directors' Fiduciary Beneficiaries***

To whom are fiduciary duties owed by the directors of a firm? At first glance this appears to be more of a question of corporate governance than a philosophical issue, but the answer to the question aims directly at corporate social practices and the normative demands that corporations raise by what they do. This revolves around the question of whom do the directors seek to benefit, and theories of the corporation are in deep disagreement about the answer to this question. This is a fundamental question in corporate law, and courts may choose either the shareholders, the corporation itself or both as beneficiaries. Yet in actual practice these choices can create conflicts. The result is an indeterminate standard. For example, under a nexus-of-contracts theory the board of directors as beneficiaries have primacy over the shareholders whose exercise of power is limited to selling their shares if they disagree with the practices of the firm. On the other hand, the shareholders may still make a claim under the maximization of shareholder value doctrine as residual claimants in cases of disputes. What is evident is that the question of fiduciary beneficiaries is quite unclear, but it is a matter of great concern to society at large because the issue of the outcome of corporate action and the resulting benefits and harms is general, and not just a matter of law, legal theory or judicial decision-making (Gold 2012, pp. 1096–1101).

Indeterminacy about fiduciary beneficiaries as it is portrayed above ignores an essential question of the purpose of a corporation and whether it is for the public good and public ends, or only for the shareholders or the directors themselves. And on the other side of the issue, but unaddressed, are the victims of harmful corporate actions and whether directors carry a fiduciary duty to insure there

is no harm, injury, impairment or intentional damage in the course of pursuing corporate business. Indecision and ambiguity, rather than being seen as peripheral to moral questions are central, and lead to problems with interpretations of personhood, the nature of corporations and assignments of responsibility, thus these are an integral part of this study. How can we interpret indeterminacy and its relationship to responsibility? It seems clear that the duty of the court is to do no harm when it is uncertain about making a decision in a case. This is a matter of simple judicial prudence. No decision should be made that allows intentional damage or harmful corporate action to continue. Avoiding harm ought to be foremost in judicial decisions. But indeterminacy can have positive properties and be a means to good ends as well. For one thing, it limits judicial mistakes in applying theories of the corporation and the entailment of normative judgements. For another, indeterminacy puts the burden of moral judgements about corporate action on the corporations who, knowing that the courts may not adhere to a particular theory, must then themselves engage with the normative implications and the risks of what they would do. Additionally, for the corporations operating in fluid and demanding markets there is greater flexibility to adapt and change and for the courts to take into account those changing conditions when deciding on cases.

### ***Corporate Purpose Clauses***

Legislatures typically leave some latitude for the articles of incorporation of a firm to include a corporate purpose clause. This sets the aims and goals of the company and can imply the fiduciary and other duties that the firm will bear. The evidence of court decisions indicates that in US law the absence of a purpose clause implies that directors owe a duty to both the shareholders and the corporation. Under the nexus-of-contracts theory, which is a derivative of aggregate theory, and absent an express acknowledgement of the corporation serving public aims, this leaves room for flexibility for the company to vary its purpose as conditions change and for court interpretation on a case-by-case basis. The implications for normative judgements of a nexus-of-contracts firm are

clear: the corporation under this theoretical scheme is conceived as a private law creation and is largely free of regulation compared to artificial entities. It has no distinctly defined public service obligation. Any effort to pursue or achieve public purposes are inimical to the sole purpose for which the firm was formed—to benefit its directors and shareholders.

### **Normative Implications of Legal Theories of the Corporation**

I have suggested above that there are normative implications in the use of theories of the corporation in judicial decision-making. There are three periods of time, three theories of corporations and four transformations through which they have gone. These are woven together to reveal a conceptual and historical pattern of normative considerations. The time periods are the Ancient, the Medieval and the Modern. The theories are Artificial Entity, Real (Natural) Entity and Aggregate.<sup>47</sup> The transformations are (1) the development of the corporation as a legal person, (2) the shift from corporations as non-profit to profit, (3) the move from closely-held to widely-held ownership and (4) from national to multinational corporations (Avi-Yonah 2017, pp. 17–18). A brief review of their principal characteristics will help to compare and contrast the implications of each theory for the normative consequences.

Under a theory of the corporation as an artificial person personhood is defined and limited by the terms of the state charter by which the corporation is created and its duties are as specified in the charter. There is a separate and distinct entity created by a state charter. The question of whether it is a private or public law entity depends on the intent of the charter. If the ends of the corporation as stated in the charter are aimed at public goods then it is a public law creation. Regulation is in direct accord with the state charter and defines what is normatively expected of the corporation with respect to social practices.

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<sup>47</sup>There is a technical debate about whether there is a separate, fourth theory—Nexus-of-Contracts. I treat Nexus-of-Contracts as a derivative of Aggregate theory developed in the very recent modern period, but not as an entirely distinct theoretical position.

Under a natural entity theory, there is a distinct and separate entity as if it is a natural person with those duties that attach to that status. The law of real entities has evolved over time from what originally was public law toward private law, but it depends in a specific case on the nature and purposes of its formation and whether those purposes are intentionally private, as they now generally are. Real entities, as natural things like persons, and once understood to be vulnerable to state-sanctioned regulation, are now subject to market forces that would presumably correct any tendencies toward excessive market power or economic and political domination. The normative implications of a natural (real) entity are those of a natural individual and their social practices are expected to conform to community, legal and other norms.

Aggregate theory (and also as conceived within a Nexus-of-Contracts model) describes a web of relationships among contracting parties, but there is no separate and distinct entity beyond the name representing the interests of the participants. In other words, any legal, moral and social issues look through the corporate creation to the individuals of which it is formed. This is a reductionist construct. In its current form the primary duty of an aggregate firm is to maximize shareholder value (or to benefit the directors). These are private law creations; state regulation is minimized and they have normative obligations exclusively to the shareholders (or directors). Any public or other socially responsive corporate practices other than shareholder primacy can be viewed as a form of theft injuring the owner-participants.

### **Three Problems of Legal Personhood for Corporate Moral Responsibility**

There are three distinct problems with the dominant theory of the corporation as it is applied in the United States. There is a problem of symmetry between the ease with which corporations can exercise a growing list of rights compared to the difficulties of holding corporations responsible for their actions, and moreover the rights themselves deserve greater scrutiny. The rights accumulated by corporations and the unalienable rights of human beings are not the same. Corporations under

the US Constitution cannot have the same rights as natural persons because under an aggregate theory of the corporation it is not part of their nature as non-entity fictions. While it may be the case that corporations can have an array of property rights enabling them to conduct business, only natural persons can have the liberty rights guaranteed under the Constitution of the US. It is a category mistake to give corporate persons the rights of natural persons because they are different kinds of things.

The second problem of corporate persons is closely tied to the first. It is their indeterminate treatment in US law either as persons with respect to property and liberty rights, or as non-entity fictions with respect to responsibility under the currently dominant aggregate theory of the firm. This asymmetry is incoherent and avoids settling the metaphysical question of the ontology of corporations. As I have explained above, the indeterminacy of unsettled corporate theory provides the positive attributes of flexibility for the courts and adaptability for corporations, but it does so at the cost of two normative issues: one is the inability to consistently and predictably hold corporations accountable for their actions. This is leading to a pervasive public sense that the possession and exercise of liberty rights by corporations fundamentally violates norms of the moral community. This sense of normative violation is amplified by the perception that corporations are allowed the unregulated exercise of rights in ways that harm and impair the commonweal without justification. The other and related normative implication is a growing loss of trust by the public that there is justice and fairness in the treatment of corporations as bearers of both property and liberty rights. There is a remaining third problem with greater significance than those of legal rights and treatment before the law, however.

It has been claimed that the legal foundation of the concept of corporate personhood is built on an apparent fraud that was perpetrated in the late 19th century (Winkler 2018, p. 190). To explain how this happened we must go back into the history of corporate personhood in the United States which

reaches back to the period immediately following the Civil War. At the time, President Lincoln wrote in a letter to Colonel William F. Elkins:

We may congratulate ourselves that this cruel war is nearing its end. It has cost a vast amount of treasure and blood. The best blood of the flower of American youth has been freely offered upon our country's altar that the nation might live. It has indeed been a trying hour for the Republic; but I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country.

As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety than ever before, even in the midst of war. God grant that my suspicions may prove groundless (Hartmann 2003).

A court case soon signaled the realization of Lincoln's fears. The case was brought before the Supreme Court of the United States in a dispute over who would have jurisdiction in assessing taxable value of fence posts along the Southern Pacific Railway right-of-way, the state assessor or the county assessor. While the case appears to be numbingly mundane, the implications were and remain extraordinary. This is due to the reporter for the Supreme Court having made a change in the language of the headnote.<sup>48</sup>

...in writing up the case's headnote - a commentary that has no precedential status - the Court's reporter, a former railroad president named J.C. Bancroft Davis, opened the headnote with the sentence: "The defendant Corporations are *persons* within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."<sup>49</sup>

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<sup>48</sup>"Before a case is published in a reporter, an editor at West reads the case and selects the important issues of law. For each major issue, the editor then writes a short description called a headnote. These headnotes are typically found at the beginning of each opinion and help the reader quickly determine the issue(s) discussed in the case." This description for Digests, Headnotes, and Key Numbers Research Guide by Jorge Juarez is found at the web site of Georgetown University Law Library: <http://guides.ll.georgetown.edu/srch.php?q=headnote&t=010>.

<sup>49</sup>Emphasis of the word *persons* is mine.

It is especially important to note that the Court had not so ruled on the nature and status of corporations.

...a handwritten note from Chief Justice Waite to reporter Davis that now is held in the National Archives said: "we avoided meeting the Constitutional question in the decision." And nowhere in the decision itself does the Court say corporations are persons (Hartmann 2019).

In the case itself, (*Santa Clara County v. Southern Pacific Railroad Company* 118 U.S. 394 (1886)), the court reporter J. C. Bancroft Davis added a headnote.<sup>50</sup> In it he wrote: "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.'" Before argument, U. S. Supreme Court Chief Justice Waite announced: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We (the members of the Supreme Court) are all of the opinion that it does."<sup>51</sup> It is often claimed that through this statement supporting the applicability of the Fourteenth Amendment and without oral argument corporations were arrogated to personhood.

It is crucial to understand where this opinion originated. In a case before the Supreme Court in 1938, Justice Black offered a dissenting opinion saying: "Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are to be included within its protection. The historical purpose was clearly set forth when first considered by this Court in the *Slaughter House Cases*." (*Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85,86

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<sup>50</sup>J.C. Bancroft Davis was a former president of the Newburgh and New York Railway Company.

<sup>51</sup>Chief Justice Waite's remark is widely quoted (and misquoted) in relevant sites on the internet. An authoritative, accurate source is: <http://www.tourolaw.edu/patch/santa/>



(decided 31 January 1938)). Justice Miller gave the opinion in *The Slaughter House Cases* in 1873 setting out a general and comprehensive interpretation of the Fourteenth Amendment (McLaughlin 1940, p. 45). It was an elementary principal that the 14th Amendment, among the three amendments to the Constitution issuing from the Civil War, was intended to protect former slaves.

There is a problem with the claim that it was the headnote in *Santa Clara* that precipitated the grant of personhood to corporations. Winkler argues that in the *Santa Clara* case it was a fraudulent representation of the wording of the 14th Amendment by Roscoe Conkling, a former US Senator, then an attorney, who was the last living member of the framing committee of the 14th Amendment, that facilitated the Supreme Court's acknowledgement of personhood for corporations (Winkler 2018, p. 190). Conkling argued that the 14th Amendment is not limited to natural persons and corporations should enjoy equal protection under the provisions of the 14th Amendment. In 1882, he produced the Journal of the committee and purported to show that the Joint Congressional Committee that drafted the 14th Amendment vacillated between using "citizen" and "person" and the drafters chose "person" specifically to cover corporations. It is Conkling's provision of this evidence and its fraudulent employment in support of corporate personhood that is inculpatory for Conkling, or so the claim is made. Winkler says that contrary to Conkling's claim, there is no evidence that the wording ever went through this process, and that there was no intent to protect corporations with 14th Amendment provision.

Winkler's case is weaker on the persuasiveness of Conkling's argument before the Court than he suggests. But the evidence that Conkling's misrepresentation of the intentions of the framers of the 14th Amendment led to 14th Amendment protection for corporations is another matter. Andrew McLaughlin, in an article from 1940 takes great pains to show that the historical record of Conkling's interpretation of the Journal does not support an interpretation that the committee intended to protect corporations with the 14th Amendment. McLaughlin cites specific evidence to show that

Conkling did not claim that the committee intentionally provided for the protection of corporations (McLaughlin 1940, p. 55). “Whatever criticism can be made of Conkling’s handling of the Journal, he did not dare to go so far as to say that the committee deliberately and consciously intended to provide for the protection of corporations” (McLaughlin 1940, p. 55). Another attorney, S. W. Sanderson, who also presented a brief in the Santa Clara case is stronger on the legal argument because in his brief Sanderson offered an extensive treatment of eighteen pages on the question of the right of a corporation to be considered a person (McLaughlin 1940, p. 57).

What is central in this is that McLaughlin’s work shows that there was already established a firm legal position that corporations had personhood status prior to the Santa Clara decision in 1886. And it also suggests strongly that there was not a sudden shift in judicial opinion giving rights to corporations in the US legal environment and that Conkling’s remarks to the Court were not decisive in swaying the judges’ stance on either the philosophical or the practical questions about corporations as legal persons. McLaughlin goes to some lengths to describe how Justice Field, who was on the Circuit Court in 1882 when the case was decided at that level, quoted Justice Marshall. Marshall in the Dartmouth College case (1819) had recognized the contract rights of private corporations and their status as artificial beings. Two conclusions cannot be avoided. One is that the personhood status of corporations came as no surprise to the Court by the time the Santa Clara arguments were presented (McLaughlin 1940, p. 54). The other is that regardless of how persuasive Conkling might have been in his argument, or to what degree he misrepresented the intentions of the framers of the 14th Amendment, he made an argument before the Court that corporations were indeed already widely held to be legal persons and this had been the case for some time prior to the hearing on the Santa Clara case.

## **Conclusion**

This chapter has been concerned with the concept of personhood and the consequences of various

legal theories of the corporation. My aim has been not to define a theory of personhood, but to further understand changes in legal theorizing of personhood, how that has developed over time and the normative significance of each theory of the corporation. In the ancient and medieval periods there is a story that can be pieced together of this abstraction of the corporate person that has led to our modern state of confusion about the nature, purpose and social practices of corporations. If we are to order the social relations between corporations and society in a way that is coherent and just, then the variety of legal claims that are made must be understood in some way that escapes endless arguments in metaphysics about what corporations are (Radin 1932, p. 643).<sup>52</sup> I propose that there is practical potential to do that by looking at corporations as intentional systems.

It is not personhood that is the essential problem. I have described how personhood endows corporations with positive attributes and enables them to accomplish important social goals. The problem is that the accumulation of both property and liberty rights give corporations certain rights and the exercise of those rights is leading to corporate practices and outcomes that jeopardize economic and financial stability, among other public goods. Furthermore, the economic and political leverage that accrues to corporations with liberty rights gives them concentrated power to influence and manipulate democratic political processes in unprecedented ways. Legislation, regulation and taxation practices that favour corporations can be seen to threaten the trust relationship between corporations and the rest of society as well as the trust relationship between government and citizens. In the next chapter I will address the possibilities and problems of intention by first looking at individual intention and then at collective intention to establish how that might be done. Before turning to that a review of what this chapter has covered it will help to connect what I have identified as the essential element of personhood to collective intention.

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<sup>52</sup>Max Radin offers a thorough discussion of the everlasting debate about personhood and whether it serves any useful purpose, but points to the importance of the fiction of personhood for corporate persons as legal fictions.

The principal problem I am concerned with is that personhood bestows on a corporation an accumulated possession and exercise of rights as a person, but without its having the metaphysical status of a real (natural) person and the moral obligations that attach to that status. Some claim a corporation cannot bear moral responsibility because it does not have standing in the moral community, whatever the scale and scope of harm it may do. Defenders of this claim hold that moral responsibility cannot be ascribed to a non-entity legal fiction, but only to a specific kind of metaphysical agent, specifically a natural person. It is natural, not legal personhood that confers agency and it is agency that confers standing in the moral community. This claim focuses on what corporations are, rather than what they do. I am taking another view. I argue that if morally significant entities are created by moral agents, and if they are addressable as members of the moral community because they are rationally conversable, even if we consider them not as natural agents, but as non-agential intentional systems, then they can bear moral responsibility for the consequences of their actions. It is my contention that it is predominantly what corporations intentionally do and the consequences that invokes questions of corporate moral responsibility.<sup>53</sup>

The concept of determinism (and indeterminism) is crucial to understanding how corporations can enjoy personhood for rights while at the same time have non-entity status regarding responsibility. These concepts have both positive and negative aspects. The confusion in judicial decision-making is visible in majority opinions handed down from the bench. It reveals that there is a kind of convenience in the absence of a determining consensus on the question of the theory of the firm. It allows judges to avoid taking a position on the nature, purpose and normative implications of corporations involved in cases that come before the courts. On the positive side, indeterminism allows for competition among new ideas and innovation in developing corporate strategies and practices. The dominance of aggregate corporate theory as a nexus-of-contracts permits a

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<sup>53</sup>Unintentional acts and their consequences, as well as intentional acts and their unintended consequences are, of course, also of crucial importance in questions of moral responsibility. I will address these in Chapter 5.

disjuncture between treating corporations as legal persons and thus as non-entity fictions on the one hand and as nearly invulnerable to legal responsibility (and moral responsibility as well) on the other hand. The capacity of a corporation to act on its own behalf through collectively intending to accomplish certain aims as an entity is the subject of Chapter 4. The idea of intention must be understood first and then collective intention as a separate and distinct concept will be compared to individual intention to clarify how this makes corporations morally significant and thus susceptible to assignments of corporate moral responsibility.

## CHAPTER 4-COLLECTIVE INTENTION

### Introduction

I begin with an example to illustrate the complexities of corporate collective intention. This instance is a recent and egregious case of abuse of corporate power and disservice to customers and outright abuse. It serves to illuminate not only the complexities of collective intention, but the relationships among the concepts of corporations as collectivities, individual contrasted with collective intention, and deficiencies in how we theorize about the concepts as well as practical policy and other responses to corporate action.

In September 2016, Wells Fargo and Company (WFC), an international banking and financial services holding company headquartered in San Francisco, California, was fined \$185 million by the Consumer Financial Protection Bureau of the United States for fraudulently creating over 1.5 million checking and savings accounts and issuing 500,000 credit cards. These accounts and credit instruments were never authorized by WFC customers and in many cases were unknown to the customers until after the fraud was exposed. The scandal that followed was caused by an incentive-compensation scheme for WFC employees to constantly create new accounts. WFC employees were under unrelenting and intense pressure to comply with the scheme to meet impossible sales targets. This WFC scandal resembles the compensation systems that led to the mortgage crisis early in the 2000s, which in turn precipitated the global financial crisis of 2008. The systemic issuance of credit instruments at WFC without customer approval or even their knowledge demonstrates that institutional pressure to comply with an intentionally designed system of incentives led not only to illegal account creation, but also to significant financial harm to customers whose credit ratings were damaged or were subject to wrongful collections efforts for debts erroneously brought against their accounts. The CEO of WFC claimed the problem was that the sales fraud stemmed from a limited number of rogue employees. The head of the department in

WFC that perpetrated the fraud made the same claim. 5,300 employees were dismissed in the incident. In the ensuing public furor, the CEO denied that WFC, the corporation, was responsible, instead blaming rogue employees for incorrectly following WFC corporate policies, practices and procedures.<sup>54</sup>

Are we confronted with an insoluble problem concerning wrongful corporate action? The problem is this: these groups often seem to be immune from moral responsibility when their actions produce harmful consequences. Although it is neither easy nor guaranteed of success, it is possible to hold corporations legally and socially responsible for what they do.<sup>55</sup> But there is no widely agreed philosophical grounding for ascription of corporate moral responsibility. The concept of collectively intentional unitary corporations as morally responsible agents does not enjoy a consensus in philosophy or jurisprudence. Despite prolonged debate about their status as agents, it has not been possible to reach agreement about either the nature of corporations or whether they can intend to do things. There is no philosophical agreement that is adequate to justify the assignment of moral responsibility to them as agents. Some argue that corporations are collective group-agent entities because as unitary agents they can have intentions. Others argue this it is not possible to treat collectives such as corporations as fundamental features of reality and that they must reduce to their constituent individual agents, because only individuals are capable of having intentions. Because there is no conclusive agreement on the nature of these groups and their intentional capacity, a philosophically coherent grounding of assignments of moral responsibility

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<sup>54</sup>Unsurprisingly, media coverage of the Wells Fargo case has been extensive. See these examples (Corkery 2016a), (Corkery 2016a), and (Gray 2016). Despite monetary fines and other sanctions, no senior executives have suffered significant sanctions in this case. It may be fairly said that the fines have been treated merely as a cost of doing business (Henning 2018).

<sup>55</sup>In response to the most recent (2018) fine by Federal regulators, Wells Fargo has been held legally responsible, but observers suggest that a penalty of \$1 billion will apparently have little effect. "The large fine is hardly crippling for Wells Fargo, however, which has more than \$1 trillion in assets. The bank reported Friday that although the penalty drove down first-quarter profits by \$800 million, it netted \$4.7 billion. 'While the size of this fine is higher than anticipated, it is expected to be easily absorbed by quarterly earnings,' Fitch Ratings said in a statement last week when the bank initially signalled it could face a \$1 billion fine." (Merle 2018).

remains out of reach. Central to the disagreement is whether corporations can meet the requirements to be moral agents like human beings and thus, through their status as agents, they can be normatively addressable as members of the moral community.

Philosophical debates about the nature of corporations as group agents, their ontological and moral status, and their capacity to bear rights and responsibilities have progressed for many decades, but without reaching any workable resolution. Yet, even as the real-world risks and harms from corporations, especially in their multinational form, have grown prodigiously in size and socio-economic impact over those decades, there has been little contribution from the debates to definitively answer these practical questions. This enduring problem is especially acute with respect to financial sector multinational corporations (MNCs). Debates about corporate ontology and responsibility continue while repeated threats, risks and crises from financial sector corporations have grown to global proportions, and now imperil the world financial system and consequently the global community.

I think that there is a way out of this impasse. In this chapter I explore whether corporations as collectively intentional entities can meet conditions required for agency, and if they cannot, whether there might still be a way to find them morally responsible. I argue that by treating corporations not as agents, but as non-agential intentional systems, they become susceptible to moral address and thereby as members of the moral community they can be held morally responsible. This provides a method of bringing not just assignments of legal and social responsibility against their harmful effects but the weight of moral judgements as well.

This chapter is in several parts, outlined as follows. In the first part of this chapter I will briefly look at individual intention. Then I will compare individual intention and collective intention and discuss collective intention as the principal subject of the chapter. The second part of the chapter identifies (1) the main issue of the relationship between collective intention and moral responsibility, and (2)



presents an argument about the characteristics of non-agential intentional systems as a potential method for ascribing moral responsibility to corporations despite a lack of consensus about their ontological status, their agency and their moral status.

The focus in this chapter is on collective intention of corporate entities, not the nature of the corporations themselves. That has been dealt with in Chapter 2. The focal concern with collective intention is whether this concept provides a plausible way for corporations to be understood as morally responsible, but as intentional systems rather than metaphysical agents. The argument—greatly condensed—of this part is that (1) philosophical insights about collective intentions can help us to understand both how to interpret the reasons corporations give for their actions and how they have moral standing and are thereby morally culpable for what they do. However, (2) those philosophical insights cannot be found exclusively through the concept of individual intention. With the concept of collective intentional systems, I will argue that we have a pragmatic alternative.

I will argue specifically that the prevailing theory of intentional agents is not adequate to address collective intention of corporations as agents or to cope with the global consequences of corporate action. Neither the concept of collective intention nor individual intention can provide adequate insights or appropriate reactions and remedies for agential corporate action. The standard story of collective intention relies on an agent having a state of mind, but corporations don't have states of mind because they are mindless; they don't have minds as individuals do. Because corporations don't have minds and because the concept of individual intention will not apply to things without minds, there is no applicability of the standard story of intention to corporations and their actions. Corporations as collective intentional systems are real and have real effects in the world consequent to their actions. When corporations as collective intentional systems take a course of action they can be held responsible for the effects of what they do, rather than for the kinds of things they are.

By joining a concept of specifically collective intention to (but as distinct from) the intentional actions of individual agents we can more fully understand and respond to corporate agential action. I claim that that we are capable of defending and preserving the common good against the harmful outcomes of intentional acts through our reflection on corporate collective intentions. When we react to those corporate actions it is expressive of our humanity. These expressions are concerns about how we as human beings react to intentional collective actions that cause harm not only to individuals and the community at large, but also and most importantly, damage to the essential element of trust. These two issues, reactions and trust, will be dealt with later in Chapter 5-Responsibility. Again, what is under scrutiny in this chapter is collective intention and how it can be practically understood to address moral responsibility for corporate action. To realize a practical understanding, it is essential to examine how a corporation might be interpreted as an intentional system. I am following Daniel Dennett's thought on this interpretation from two articles (Dennett 1971) (Dennett 1981b).

### **Individual Intention**

Ordinarily, it is the concept of the person to which we refer when we consider the chain of moral responsibility and accountability starting with wrongful action from individual persons, then looking to their status as agents, and then to their moral standing in a moral community and finally their susceptibility to moral judgements to assign moral responsibility. The most fundamental concept, that of the natural person, is the first link on which the other concepts depend as we trace the chain from one end to the other. However, it is immediately apparent that the commonly agreed understanding of personhood is complicated by legal and philosophical definitions of persons, some of which are familiar and some of which seem very unlikely, such as groups and organizations, as I have explained in Chapter 3. What is important here is that personhood is the starting point and yet it is not a concept that is clearly understood or that has a commonly agreed definition as Chapter 3

has illustrated. What it is that counts objectively as a person is highly contentious, and Daniel Dennett concludes that there are grounds for doubting the concept of personhood entirely, saying there are no objective, non-normative grounds by which we can tell if we are persons (Dennett 1981b). Dennett is concerned about incoherence with respect to the concept of persons because he fears difficulties if there is more than one applicable concept of persons. He recognizes that there are two notions of a person—the metaphysical and the moral. The metaphysical person is an agent that is intelligent, conscious and feeling. The moral person is accountable and has both rights and responsibilities; it is a person as an end-in-itself. The question that this raises for Dennett is whether the metaphysical person is a necessary but not sufficient condition for being a moral person. For Dennett, being rational, in the sense of being a metaphysical person that acts for his or her own good or advantage (or the good of each person cooperating in the case of a collective)<sup>56</sup> allows intentionality, and also allows being an object of a particular stance taken towards him or herself. This makes one a person in a normative sense. Furthermore, the stance taken toward a person must be reciprocated by that person to qualify for personhood. I.e., the object defined by application of the normative stance as a person must be capable of reciprocating the stance (Dennett 1981b, p. 270).

If we cannot easily and clearly agree what is meant by a person as such, it may be possible to approach an understanding by contrasting and comparing them to entities not commonly considered to be persons but defined as such in the law, e.g., groups and collectivities. Thus, by examining distinctions between personal subjects and collective subjects we can distinguish the essential characteristics of personhood. We might begin by asking: what are the fundamental requirements for a collective subject to meet an agreed standard as a person? Is it a matter of having perception and memory and the capacity to form the appropriate degrees of belief and

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<sup>56</sup>See: Rawls (Lectures on the History of Political Philosophy 2007, 54 ff.) from which this notion of rationality is taken.

desire for a collective subject to be a person? (Pettit 2002, p. 458). Mutual awareness in forming a complex web of awareness held among the individuals in a collective of subjects is necessary for a collectivity to become an intentional subject.<sup>57</sup> According to Pettit, this does not guarantee rational unity, which is necessary to count as a rational subject. What is required, for Pettit, is that collective subjects be capable of two things: they must be capable of possessing intentional states, and they must perform actions that correspond to those intentions. And there is a third essential element, the ability to avow those states and actions and claim them as their own (Pettit 2002, p. 461). The unification of intentional states and actions in a rational way is what justifies and qualifies personal subjects as more than merely intentional subjects. And if, having qualified as persons, they fail to rationally demonstrate a unification of intention and action, then they can be held responsible for that failure.

By following this line of thought Pettit might be charged with attributing to a collectivity an ontological status independent of the individuals by which it is comprised, and of assigning to it a property that properly belongs to its constituent individuals. He defends the qualification of personal collective subjects by arguing that those collective judgements and intentions do depend on individuals and cannot vary independently of those individuals and by this it is not made “an ontologically emergent realm” (Pettit 2002, 460). But Pettit does assert that he “...shall take as persons those intentional agents who can avow their intentional states and the actions they perform” (Pettit 2002, p. 461). Extending the argument to integrated groups—and based on his assumption above that intentional agents who make and can be held to avowals can be defined as persons—then integrated groups are institutional persons and operate under a discipline of reason to be accountable for failing the test of rational unity of their states and actions.

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<sup>57</sup>See: Gilbert (On Social Facts 1992) , Searle (The Construction of Social Reality 1996), Tuomela (The Importance of Us: A Philosophical Study of Basic Social Notions 1995), Bratman (Faces of Intention: Selected Essays on Intention and Agency 1999) as cited by Pettit, 2002.

In an essay by Margaret Gilbert, which focuses on backward-looking moral responsibility, i.e., having to do with causation, she is concerned with how blame (judgement) might be assigned to a collectivity, which she defines as a plural subject—a population of people who are party to a given joint commitment (Gilbert 1992, pp. 64–95). Gilbert contrasts forward-looking moral responsibility which has to do with obligation. The joint commitment is a commitment of the will produced by personal decisions and intentions of either the personal (individual) or the joint kind, i.e., of two or more people, but in the latter case all of them intend to do something as a single body. Joint commitment then, links people in a unifying way such that it is appropriate to say that they “...have created something new”, something that is more than a mere aggregate (Gilbert 1992, p. 102).

It may be that we will have to accept the ambiguity that seems inherent in the concept of personhood. Indeed, John Rawls uses the term persons in just that ambiguous way: A word about the term ‘person.’ This expression is to be construed variously depending on the circumstances. On some occasions it will mean human individuals, but in others it may refer to nations, provinces, business firms, churches, teams, and so on. The principles of justice apply to conflicting claims made by persons of all of these separate kinds. There is, perhaps, a certain logical priority to the case of human individuals: it may be possible to analyze the actions of so-called artificial persons as logical constructions of the actions of human persons, and it is plausible to maintain that the worth of institutions is derived solely from the benefits they bring to human individuals. Nevertheless, an analysis of justice should not begin by making either of these assumptions, or by restricting itself to the case of human persons; and it can gain considerably from not doing so. As I shall use the term “person,” then, it will be ambiguous in the manner indicated (Rawls 1999, pp. 193–194).

### **Collective Intention Broadly Considered**

Questions about the moral behavior of collectivities seem to be a constant in modern life. Almost daily we are confronted by media reports of acts of wrong-doing on the part of various social

institutions such as corporations, governments, schools and other collectivities. Accompanying these incidents are equally serious questions about what responsibility should be attached to those who commit such acts and how to make accountable institutions and entities that engage in systematically wrongful behavior. However, we are confronted only rarely with examples that are so shocking in their moral significance that they change our moral and ethical perspective on the social world. Two examples of catastrophic acts of collective intention and failures of collective moral responsibility are Auschwitz and Birkenau, the infamous death camps, and the strategy of area bombing of Dresden and its civilian population. The physical and conceptual architecture of institutional moral failure leaves an indelible impression not only by the intentions that are inherent in the buildings of Auschwitz, in the enclosed spaces they contain and in the purposes to which those spaces were put, but especially by Birkenau and its technologies of extermination at an industrial scale. These reveal the results of collective intentions that constitute some of the most controversial moral questions of the modern era about the nature of intentions of institutional collectivities and joint social action.

### **Alternative Views of Collective Intention**

In the philosophical literature there is a long and continuing debate about the concept of agency and the nature of intentionality. And the current debate on individual and collective agency seems to be enjoying a resurgence as a topic in contemporary Anglo-American philosophy. This debate covers a wide range of concepts such as shared intentions, shared responsibility and collective responsibility, we-mode and I-mode intentionality, corporate moral agency, joint action as well as others and is quite active. But on further analysis, it is also a debate that has apparently gone stagnant. While the debate appears to thrive in scholarly journals, paradoxically, based on the number of publications and the complexity of the arguments, it is characterized by very little linear progress in resolving the question of when or even if intentionality and thus agency can be

legitimately attributed to collective entities. This matters because the consequences of the actions of collective institutions have obvious significance and we have no widely agreed conceptual framework with which to coherently deal with the problems that collectives present to the social order. Why is concern with collective intention becoming of such interest at this particular point in history? It may be in large part because globalization is rapidly changing the material base of everyday life. And we do not have a legacy of proven concepts, a historical experience or a comprehensive database that allows us to prepare for and successfully manage the simultaneous impact of trans-national institutional agents, economic recessions, disruptions to the energy supply and climate change on a global basis. Contemporary economic, technological and natural transformations are compelling us to critically analyze institutional behavior, action and agents and to understand those transformations as being as important to us now as those of individuals were in the period of industrialization. This essay will explore the status of the philosophical debate about the concept and nature of collective agents by concentrating on the central concept of intentionality. Specifically, it will address the intentions of agents as they are expressed in their actions and omissions and consider the philosophical consequences that attach to joint social actions that ensue. The debate centers on two forms of intentionality, “we-mode” and “I-mode.”

It is important to recognize if only to briefly mention that there are substantive, critical, alternative views on collective intentionality. A reason to mention these is to further contextualize the contending points of view and suggest that the positions of we-mode theorists, especially Searle and I-mode theorists, particularly Bratman, are central to the current debate. There are quite different and specific interpretations of intentionality, for example, Raimo Tuomela (1995), (2006) Seumas Miller (2006), Margaret Gilbert (1992), (2006) David Velleman (1997), Deborah Tollefsen (2004), (2015) and the emerging work of experimental philosophers whose concern is with recent discoveries in neuroscience. These are of significant interest as critiques of the Searle-Bratman

debate and for further research study. The core idea to be emphasized here however is that we-mode intentionality as it is argued by Searle and I-mode intentionality as interpreted by Bratman are the principal interpretations and stand implacably opposed in this debate. Later in this chapter I will give a more detailed treatment of John Searle's work, which will be examined and critically compared to that of Michael Bratman as to how the collective intentionality debate is centered in the philosophy of language.

### **Collective Intention, States of Mind and Courses of Action**

This section of the chapter begins an exploration of collective intention as it is understood through two contending conceptualizations. The failure of the Searle and Bratman debate to yield an adequate answer to questions of moral responsibilities of collective entities lies with their ultimate reliance on individual concepts of intention. In both cases it is a state of mind of the individual intenders that underpins the positions taken by both Searle and Bratman with respect to collective intention.

The two points of view that I distinguish as State-of-Mind and Course-of-Action. A State-of-Mind perspective requires that the nature of a collective agent sufficiently conform analogously to that of an individual, natural agent to permit a legitimate ascription of responsibility. In a Course-of-Action view ascription of responsibility is concerned not with the nature of the agent, but what course of action the agent plans and executes and the consequences of that action.

However, there is the possibility of an ambiguity that must be resolved before going further. The potential ambiguity is whether the argument in this chapter is moving away entirely from a concern with intention in the case of collective agents or if the argument continues to deal with intention directly, but not intention that is based on a state-of-mind conception. This thesis addresses the concept of collective intention, but not intention as the result of a state-of-mind of a metaphysical



corporate agent. There are complex and unresolved debates about the possibilities of metaphysical persons having a state-of-mind as a characteristic that could make them liable to ascriptions of moral responsibility, but the seemingly unresolvable difficulties in the state-of-mind approach and the severity of the problems issuing from corporate action motivate my search for an alternative. The concept of intention, far from being discarded in this discussion is approached from another perspective necessitated by the metaphysical nature of the collective agent involved in corporate action.

In this part of the chapter I address the concept of collective intention in detail, how it is defined and how it is understood by theorists with respect to corporate agents. I claim it is necessary to examine the state-of-mind concept due to its deficiencies. It is the enduring but unresolved debate about how collective intention is theorized and its failure to produce actionable philosophical insights despite urgently needed remedies to protect the community and the common good from harmful or predatory corporate action. It is important to note that the instances of protection and remedy I refer to result from corporate actions that result in harm or damage directly, i.e., to a singular individual producing a sensation of pain, as well as a sense of wrongful action with a shared, vicarious, but not necessarily unanimous feeling of having been wronged among the members of a community as the result of some intentional corporate action.

I said above that there are two conceptualizations of collective intention: one holding that intention issues from a state-of-mind of the agent, the other that intention is revealed in what is described as a course of action taken by the agent. These two positions are heavily contested and each raises serious issues about their meaning and application.

To reiterate: to sufficiently understand the debate about collective intention the discussion addresses how collective intention is variously understood. The domain of examination in this portion of the chapter is collective intention of group agents.

There is a hard problem confronting our efforts to understand the reality of corporate collective entities. The hard problem is that those entities as legal persons are metaphysical. If they can be held morally responsible by what means might that be done? I am arguing that it cannot be through their agency, by their status as agents. This thesis discusses the metaphysical aspects of collective entities, but it emphasizes the duties they bear as the grounds for ascriptions of moral responsibility.

My aim here is to set out in what ways the debate about collective intention is inadequate and how it is deficient in yielding a sufficient grasp of relationships to or remedies for essential socio-economic problems (instability, ignorance and insecurity) resulting from failures to meet corporate obligations relating to intentional action.

### **Collective Intention as State-of-Mind and Course-of-Action**

There is a long-standing debate between reductionists whose arguments hold that corporations as constituted legal entities ultimately must reduce to the individuals that comprise them because those individuals do indeed possess the requisite states-of-mind for moral responsibility.

Understood as natural persons, there are few questions about the metaphysics of individuals as agents. Individuals are real and are capable of states-of-mind, barring the exceptions of physiological pathology, cognitive underdevelopment or other forms of impairment that excuse them or exclude them from the moral community and thus from moral responsibility. In contrast, collective agents as legal but artificial persons are metaphysical creations, and the claim that they can have states-of-mind remains a matter of contention. The timely arrival of a definitive answer to the question of whether a collective entity can have a state-of-mind and thus settle the issue of assignment of moral responsibility is unlikely, even as demands sharpen for remedies to malevolent corporate intentional action. But, as I have said, the undeniable reality is that corporations themselves are real legal, economic and social phenomena and as such have the capacity for real

effects in the real world. There is a distinction that must be made here between two possibilities in understanding and dealing with corporations. One possibility is to treat any corporation conceived as a conceptual legal construct as a simplistic reduction to individual human beings. That, however, does not take account of the realities of corporate action, organization and enablement as distinct from its members. For example, no one individual can build a commercial jet airplane. Boeing or Airbus as a unitary entity can, by offering the structure and facilities and resources that enable a coherent organization of individuals to do this, and this includes Boeing or Airbus in the production of the results. But the production of such an artefact is not accomplished only by individuals. The second possibility in our understanding of corporations is, when things go wrong, the invariable reduction of assignments of responsibility to individuals. Assigning responsibility to individuals that comprise a corporation is an assignment that excludes the corporation itself from culpability. For example, it is patently implausible to hold solely responsible the software engineers that produced the algorithms and compiled code that allowed Volkswagen to cheat on testing for nitrogen oxide emissions. Again, the distinction to be noted here is between acknowledgement of the organizational and enabling role of the corporation in the production process and the legitimate targets for assignment of praise or blame for the results of that activity.

Acknowledging this reality of the existence of corporations as unitary entities in their own right demands that we provide an accounting for the intentions involved in their corporate activities given both the consequences of those activities and the nature of the corporate entity. Thus, there is a specific kind of intention involved when corporations take intentional action, but those intentions are not founded on their possessing a state-of-mind. The kind of intention that is under scrutiny here results from the adoption by the entity of a course of action.

Whether we can find a form of intention based in state-of-mind that suits corporations plausibly and effectively is one of two principal questions. The core of this question is whether a

state-of-mind is essentially the same and is philosophically convincing for both individuals and for juristic persons. But to answer this it would be necessary to exhaustively examine the balance of arguments between the metaphysical aspects of entities as creations of law and those entities that are natural persons. There are two distinct problems in answering this question. One problem is that the dispute seems insoluble. Revealing the full extent of the insolubility confronts us with engaging intractable problems in philosophy of mind, action theory and moral theory. The second is that from the standpoint of applied normative ethics an unlimited debate is increasingly unaffordable given the threat posed by financial sector agents (among others) and their capacity for destabilization and damage to the global commons.

The other principal question is whether we can find a form of intention based in course-of-action that suits corporations plausibly and effectively. If we reject the metaphysical approach on both the grounds that the urgency of, say, financial sector threats as structural problems demands an effective and timely response, and on the grounds that a possible solution is available in lieu of resolving the metaphysical questions about state-of-mind of collective agents, then it may be possible to engage with the immediacies of real world issues. This would be a solution that relies not on the flat utilitarianism of simply holding corporations responsible. It would let the chips fall where they may with respect to the complaints that blame would fall on innocents (employees, families and communities), but hold whole corporations liable for the misdeeds of blameworthy individuals (rogue traders, etc.). A potential solution, I suggest, lies in our reaction of having a shared sense of wrong when non-agential intentional systems intentionally act anormatively. This is a middle way between flat utilitarianism as one alternative and metaphysics of responsible agents as another. It recognizes our humanity, and our natural individual human and social reaction to having been wronged with deliberate intent. But it also distinguishes between action that is intentionally harmful, overtly selfish, or reckless and that which is unintentional.

As I have indicated, there are two different principal philosophical views of intentions. One view is collective intention based on a mental state. This is defined as if for individual human beings and has cognitive and motivational components. This view of collective intention is mysterious and complex because it relies on a state of mind that motivates collective action with goal-directedness and is characterized as an “action-like” state, but the collective is not a human being. It is a dispositional attitude with causal power to produce action. The properties attributed to mental state collective intention appear to apply as if to individuals, but it is not clear how they apply to a collective as a unitary thing, including juristic persons as legal fictions. Intentions, in this view, have the power to produce action, but the process is subject to a mysterious transformation from a cognitive state of belief and desire to possession of a collective intention through to an intentional action taken by the entity. There is a residue of uncertainty with respect to ascriptions of responsibility when this is applied to group agents holistically because it is not clear from where a group agent derives its beliefs and desires except in the minds of its constituent individuals.

The second view is that the adoption of a course of action is sufficient to ground intention. Unlike state-of-mind theory, course-of-action does not rely on mysterious dispositions and transformations. Collectives can as non-agential intentional systems, just as with individuals, share the adoption of a course of action and be addressed with praise and blame for the consequences.

### ***State-of-Mind***

State-of-Mind theory conceives of intention as a mental state (a state of mind) of an agent and a majority of theorists take intentions to be mental states. Intention contributes to the determination of (i.e., deciding upon) what is (intentionally) done by an agent so we can say that intention is the determination of what agents do. Agents are said by State-of-Mind theorists to do two things—they intend, and they act with an intention. In other words, an agent could have an intention, yet not intentionally act on the intention that she has, so they could be considered as separable in this way.

A first question to ask is if intention is characterized necessarily by a state of mind possessed by an agent. In 1957 Anscombe argued against the idea that an agent's actions had something to do with a state of mind (Anscombe 1963). Anscombe effectively challenged the idea that an intention as a state of mind preceded an action, but she did not provide a definitive answer to make sense of precisely what an intention is. Donald Davidson offered a deflationary analysis of state-of-mind theory; so-called because his analysis reduced the inflated state of thinking that intentions had to be full-blown mental states. Davidson, however, conceded that pure intention would make action unnecessary. Mental states, invoked by agents to justify action, are claimed to be physical states causing the action. Reasons given by an agent must explain the agent's actions, or else they cannot be causal; reasons justify agential action (Davidson 1963).

The prevailing view in contemporary philosophy remains that intention is characterized by a state of mind yet the debate about the nature of that state has failed to yield either of two outcomes. It does not, after inexhaustible discussion, move us very much closer to a definitive answer to the nature of intention. More importantly, it does not provide much help in determining if, based on whether they can possess a state of mind, there is a way to assign responsibility to collectives. Does intention require that mental states have certain properties to be sources of power? Intention cannot, according to state-of-mind theory, be merely goal-oriented, possess a plan component or contain an attitude. Intention, according to the theory, must also be "action-like", have conative components (expressive of attempted action), and be an executive state that actually motivates action. These definitions don't characterize what we call intentions. Mental states must also be actionable, have the power to motivate and to play a causal role between deliberation (reasoning, belief, desire) and action. This conceptualization inserts intention between reasoning (belief, desire) of the agent and the action. Corporations are a reality. They exist as metaphysical persons, and it is not yet clear how a metaphysical corporate person might possess a state of mind that would satisfy

the demands of state-of-mind theory.

### ***Searle—Realism and Collective Intention***

In *The Construction of Social Reality* (1996) John Searle attempts to solve a puzzle about the nature of social reality. He construes this puzzle-solving effort as a working through of the ontology of facts. The solution for Searle's puzzle of social reality is found in resolving how the most fundamental of objective facts, the physical or "brute facts", those that exist independently of human thought, can be socially composed into a structure of institutional facts resulting in social reality.

Basic to Searle's argument is that objective facts exist and his argument, which is at bottom a defense of Realism, is aimed at answering Anti-Realist arguments about the nature of reality. It is not necessary to fully examine the Realist -- Anti-Realist debate here to isolate and examine the notion of collective intention as Searle understands it. But it is important to understand why Searle's work is predominant in consideration of collective intention at all. Because Searle is attempting to explain how social facts happen and the social reality that results from them, he devotes considerable attention to the process and production of social reality in this work.<sup>58</sup> Social reality occurs as a consequence of the assignment of roles and functions to tangible objects, the subsequent sharing by groups of people of intentions that they hold in common, and by their adherence to rules by which objects are understood, apprehended and used.

Searle's *Construction of Social Reality* is a modernist document in the sense that he asserts that there are objective facts. As a realist he holds that there is a real world of objective facts whether there are humans around to recognize this or not. He is also post-modern in the sense that he conceives of knowledge as concerned with facts that are socially constructed. Objective facts fall into two categories: brute facts that exist independently of what humans think about them, and

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<sup>58</sup>More than half of Searle's *The Construction of Social Reality* addresses this problem. The last portion of the book is Searle's argument defending Realism against Anti-Realists.

social facts that depend for their existence on the thinking of human beings. Furthermore, while language is necessarily employed to state the facts, those facts as we state them can be separated from and recognized as distinct from our statements. Language then is a social fact as well.

Social facts are the more general of the two socially constructed types of reality for Searle. The other type is that of institutional facts. Both social and institutional facts are generated by human beings through their practices and attitudes and it is Searle's intention to explain how social and institutional facts come into existence. Social reality is the product of human action that assigns functions or roles to physical objects, through agreements among groups of people to share a common intention about those objects and through agreements among groups to conform to rules by which they will treat those objects in similar ways. Social constructions then, are realities, and they consist in objective facts. It is important to note that social reality and physical reality do not exist entirely independently of each other, because social facts rest upon brute physical facts (Searle 1996, p. 35). There is a hierarchy of facts in which a superstructure of institutional facts exists over a substructure of physical facts (Searle 1996, p. 35) (Fig. 5.1). Social facts are more general than institutional facts, which are more specific and involve human institutions. While for Searle social facts are any facts that involve collective intention, it is important to note that we can distinguish between social facts through their differential dependencies. Social facts depend on collective intention, but not upon formal human institutions. Institutional facts depend on both, according to Searle. Searle's conceptualization of collective intentionality demands explanation to fully understand implications of the claims he makes. Searle says that social and institutional facts are created through human construction. And again, under the assumption that human beings are social, it may be as Searle claims that human beings construct their social reality and can thereby enter into certain agreements that will establish and sustain social and institutional facts. Yet this does not fully explain either the specific nature of the agreements or the nature of the collective



intentionality upon which his explanation depends.

Institutional facts are central to Searle's argument so further exploration of these is warranted here. These are facts only because people agree on them. People believe these facts to be real as in the case of money, i.e., a valid form of exchange is agreed to. Postulating and explaining collective intentionality is a first step in solving the puzzle of how institutional facts can be created from brute facts and can become objective facts rather than subjective facts. By deriving intention from a collectively agreed aim we can think of this as foundational because it is not reducible to individual, first-person intention. The second step is locating social and institutional facts inside a system of constitutive rules (Searle 1996, p. 43). Without constitutive rules social and institutional facts cannot exist. These rules take the form of: "X counts as Y in context C" according to Searle's formulation. We agree collectively to such formulations and thus create social and institutional facts. These constitutive rules are related to institutional rules because through them we impose a definition or a status to which a function is attached beyond the brute physical functions that can be attached to physical objects. The collective agreement (or at least acceptance) imposes both the status and the function that accompanies the status. This demands as well that the status and function be of the sort that actually can be collectively agreed. And this must be sustained over time or the function will fail. Money, for example, must enjoy a sustained agreement to be functional as a mode of valid exchange. In summary, collective intention assigns a new status to some phenomenon. The formulation of the assignment is "X counts as Y in C." Those who participate in the agreement do not have to be consciously aware of the agreement to make use of this kind of assignment. Because we grow up in cultures taking institutions for granted it is part of our background culturally (Searle 1996, pp. 46–48). Thus, we do not have to be fully conscious of the specific collective intention to participate in accessing the functions of social and institutional facts, following Searle's formulation. The imposition of status functions on objects becomes a

general policy and the formula acquires normative status and thus becomes a constitutive rule.

Collective agreement about assignment of a status is constitutive of having the status, and having the status is essential to performance of the function assigned to the status. The Y term must assign some new status that the entities named by the X term do not already have. The new status requires collective intentionality -- it is both necessary and sufficient to create and sustain it (Searle 1996, p. 51). The role of language is crucial to this process. In the Y expression of Searle's formula, the label or name attached to the institutional fact created is constitutive of the fact. It is, then, linguistically constructed. Summarizing, social and institutional facts can be understood as intentions of individuals, but these are not constrained to be exclusively first-person intentions, intentions of those entities that possess a mind and consciousness. Rather, individuals have "we-intentions" that are primitives and do not reduce to intentions of first-person, conscious entities. It is interesting to note however, that Searle's conceptualization recognizes that there are individual intentions and these are primitives with respect to the acts of individuals. He claims likewise that there are collective intentions and that these too are primitives, irreducible to individual first-person consciousness. There is an unresolved puzzle then about why Searle is so concerned to understand collective intentionality in terms of individual intentionality if they exist as discrete primitive forms.

Searle's formulation has these key points: collective intention, constitutive rules, and status functions. The most important and contentious of these is collective intention. This key element solves the conflict between irreducibility of collective intentionality to singular (first-person) intention on the one hand, and on the other hand the requirements of methodological individualism which seems to require that we reduce collective intentionality to individual intentionality. Methodological individualism can be briefly described here as an attempt to describe laws that are both necessary and general. It is an extension of the evolution of scientific method in

the physical sciences into the social sciences upon which Searle is leaning as he tries to deduce necessary outcomes from thought experiments and assumptions about certain conditions being true as he thinks through this puzzle (Fitzpatrick 2003).

### ***Searle and State-of-Mind***

The role of collective intention in collective or joint action is central to understanding why Searle gives so much attention to the creation of social facts. Searle is suggesting that the participants in a collective intention must all think or intend in terms of “we-intend.” That is, there is an essential character to collective action that rests in the awareness in the individual mind of each participant of a “we-intention.” It may be more strongly stated as the case that the “we-intention” must be in the multiple heads of those who constitute the “we.” This “we-intention” is characterized by the fact that it can be distinguished from the “I-intend” awareness that reduces to first-person conscious minds. Searle is moving beyond strictly personal notions of intention. He characterizes collective intention such that we are required to recognize it as unique; it is a reality of real social institutions. It is a social reality formed by the actions of persons acting in groups and in light of the fact that an individual holds an intention concerning a collective's activity. This phenomenon of sharing is essentially the awareness of the participants of a “we-intention.” While the strength of this argument makes Searle's formulation central to we-mode collective intentionality he does not fully address the nature of collective, or joint action.<sup>59</sup> This is a serious short-coming in Searle's position as it leaves incomplete his understanding of the role of groups taking action based on “we-intentions.” Yet consider the example of collective action that Searle offers to differentiate collective behavior from simple, summative individual behavior. As a way of indicating through identical physical actions how different simple summative behavior is to collective behavior we may

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<sup>59</sup>Searle consistently uses the term “collective action” to describe acts of groups. Bratman persists in using “joint action” to describe the same phenomena. Following the many other writers in this debate, I will use the terms interchangeably.

infer a more sophisticated treatment of collective action than Searle's critics concede.

Searle asks us to imagine a group of people sitting in a park who run to and converge on a common shelter to escape a sudden rain. They do so without evidence of any consciously collective behavior; each is acting independently of the others. Then he asks that we imagine a group who run to a common point in the same park but as part of a ballet performance. Externally the running behavior is the same, but internally the cases are distinct. In the former case the "I-intend" behavior is without reference to others; in the latter case the "I-intend" behavior is derivative from a "we-intend" behavior and references the others in the ballet company. In this second case, there is a dimension of cooperation, a psychological mode in which the action is intended and makes reference to other participants in the collective action (Searle 1990, p. 408).

These are "we-intentions," and Searle accounts for these by reference to a concept of a set of capacities individuals have to sense that the other in a collective action is a potential participant, a co-operator in the sense of being a potential member of the collective action. Thus, there is a presupposition at work in which capacities in the background emerge to enable psychological states that are intentional states of mind. For Searle, cooperation is part of the background, but he thus cannot explain cooperation in intentional terms. The intentional state of mind is not part of the background; it is in the foreground of collective action. But the background by which Searle explains the enablement of psychological states is a set of capacities -- these are pre-intentions and provide the conditions or establish the potential for intentional states.

### ***Bratman—Joint Social Action and Intention***

In contrast to Searle's notion of collective intentionality it is instructive to turn to Michael Bratman's perspective, as it is a view of intention that does not go beyond that of the conscious first-person individual. In further contrast to Searle, however, Bratman directly addresses the matter of joint

action, which helps us to understand not only collective action but more of what is at the core of this debate. By comparing Bratman's work on collective intention to Searle, and exploring what Bratman means by joint social action, we may gain a more complete picture of the differences between these theories and the perspectives they offer.<sup>60</sup>

Bratman's suggests that "our" intention is a complex or a web of individually held personal intentions, and he uses the phrase "shared intention" to denote an intention that is different from the statement "each of us intends to (take some action)." At the risk of over-simplifying Bratman's position can be described briefly. Bratman holds that two or more people share an intention when (1) each of them intends (to perform an act) by virtue of the activity of each of them, and (2) each of them intends (to perform that act) by virtue of the individual intention held by each of them that (the act be accomplished). Using Bratman's example to illustrate the point, to paint a house each participant would have to intend to paint the house by virtue of the activity of each participant and each participant would have to intend to paint the house by virtue of the intention of each of them that the house be successfully painted. (3) There is a further requirement that it be common knowledge among all the participants that these are the existing conditions of knowledge and intention.<sup>61</sup> It is worth noting here that the intentions are individually held and Bratman is assuming an overall agreement with respect to intention among the participants. In Bratman's case then, it is the coordinated, shared I-intentions that is the essential aspect of the joint action, in comparison to Searle who requires each of the participants to have in his or her head the same we-intention. Further, Searle relies on the background capacities of the participants to achieve a requisite psychological state while Bratman relies on the commitment of each to a coordinated, cooperative joint action.

Bratman argues that those who share an intention might find it necessary to negotiate within the

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<sup>60</sup>(Baier 1997)provides a more extensive treatment of the differences and similarities in the Searle-Bratman positions.

<sup>61</sup>Bratman is using common knowledge in a non-technical, unexamined way here (Bratman 1993).

parameters of that intention due to individual differences about the intentions. If, then, there are those who have particular intentions that do not conform to that which is agreed as the aim of the collectivity, then negotiating and bargaining may be required. In cases like this, where imperfect alignment of intentions occurs, each of the participants may review their intentions and reconsider his or her commitment. This may threaten the overall aim to act jointly or constrain individuals in such ways so they avoid threatening the joint action.

Bratman's argument regarding shared intentions has three main features worth iterating very briefly in consideration of the essential of interdependence among the individual intentions of the participants. The crucial aspect of cooperation in joint actions has the following features: There must be a commitment to the joint activity despite individual participants possibly having different reasons for participating. There must be interdependence among the participants in the form of mutual responsiveness; this is reflexivity of intentions. And there must be a minimum of cooperative stability over time as well as the potential for reciprocal assistance while engaged in the joint action. Setting aside the asymmetry of the commitment requirement in which joint activity demands a commitment but solitary action does not demand a similar symmetrical commitment, Bratman seems to derive his conceptual concerns with collective intentions from those individual intentions rather than treat the collective entity as a primitive social fact in its own right. Thus, we have the puzzling situation of both Searle and Bratman dealing with individual intentions that have to be explained in terms of collective intentions and collective intentions that have to be explained in terms of the individual, rather than two discrete primitives to be explained in their own terms, assuming it is possible to do this without referring to individual intentions.

Bratman's analysis of intention and joint action is very sophisticated and abstract. It appeals to the intuition we have that somehow it all comes down to individuals in cases where joint action is undertaken and especially if we must find the primitive intentional agent in situations where shared

intentions are necessarily involved in the pursuit of goals. And there is that aspect involving rational deliberation and conscious planning by the participants to accomplish a shared aim that makes sense to us. By comparison, Searle's conceptualization has intuitive appeal as well. Yet in contrast to Bratman's example of painting a house, where the task could, if necessary, be accomplished by one person, Searle's example of performing a ballet in the park suggests that there are situations in which it is the collective that is the primitive agent. Reducing the situation to individuals makes little sense when it is necessary to not only coordinate but cooperate in a psychological mode in which the action is not only intended but explicitly makes reference to other participants in the collective behavior.

### ***Bratman and State-of-Mind***

Michael Bratman's "The Simple View" (of intention) says we do (action of an intentional kind) intentionally only what we intend to do (Bratman 2005). In the simple view there is a unity of intention (a mental state) and intentional action (what we do). There is in this unity a root idea of a relation, something they have in common, but it is not entirely clear what that relation is. There are two approaches to a clarification—one is belief-desire—that intention reduces to the beliefs and desires of the actions of the agent. The second is the simple model offered by Bratman. While the Bratman's view is subject to much contention and debate the point here is not to engage that controversy, but simply set out the model that Bratman describes.

This "simple view" model makes the relationship between intention as a mind-state and intentional action one of belief-desire, of doing as constitutive of the belief-desire of having an intention. Bratman describes these two common ways to approach the problem of the relationship between actions and mental states. The first is the belief-desire model and it sees intentional action in a relation to the belief-desire of the agent, but it reduces the intent to act to the belief-desire of that agent. Bratman disagrees with this model. The second model is what Bratman calls the simple

model of intention. Bratman claims this model appears to solve the problem of the relationship: for an agent to intentionally do A (some act) the agent must have the intention to do A. The agent's mental state at that time must be such that A is among those things the agent intends (Bratman 1984). Those who challenge the simple view (the second model) argue that there are cases where it is rational for an agent to act intentionally to cause an outcome, but irrational to intend that outcome. We recognize that it cannot be rational to knowingly have inconsistent intentions. If we pursue multiple outcomes that are inconsistent, then we cannot have intended both outcomes if we know that achievement of both is impossible. This leads to rejecting the simple view and we take a stance that we can do something intentionally without intending to do that thing specifically. The limitations of the simple view are that it does not allow for complexity. In cases of intended action producing unintended side effects (even if foreseeable) we do not intend all the consequences we expect to incur by pursuing the outcome of our actions. Another challenge to the simple view is that there are cases where the expected side effect is brought about intentionally—we characterize these as intentional when the agent explicitly considers the side effect in deliberating the action and where the side effect is negative. All of this has to do with individual agents. Complications arise when agents are collectivities.

### ***Summary of Intention and State of Mind***

In his review of Georg Meggle's book, *Social Facts and Collective Intentionality*, Ingvar Johansson said of that anthology: "To give an overall evaluation of this mosaic of an anthology would be like trying to add colors, shapes, and electrical charges together and then try to find a mean." (Johansson 2003). Something similar can be said of an effort to precisely locate the argument between Searle and Bratman. It is not yet clear if the argument between them is merely a contest between assertions of reducibility of intentions to psychological states in first-person minds (Bratman) against assertions of the irreducibility of we-intentions of we-groups (Searle). Searle's



argument can be construed in a confusing variety of ways. Quite apart from being a statement of social holism, Searle seems to rely on methodological individualism, but not of the classical sort. This has consequences for the quality and clarity of his argument. Further, he rests, or seems to, on the notion that collective intentionality is in someone's head, and in another's head, but the heads contain nothing more than that and do not necessarily contain mutual beliefs about intention. Yet from this he derives a collective intentionality among the participants toward collective action. And it is not yet clear that Bratman is arguing directly against Searle in the sense that he confronts Searle's argument directly. This may be because Bratman simply holds that there is no primitive construed as a collectivity. While Searle is at pains to explain and defend the reality of two primitives—one of intentional individuals and one of collectivities, Bratman simply holds that the intentions that relate to all collectivities must reduce to individuals. Thus, that certain collectivities are “minded” in such a way as to be distinctly autonomous entities, and that they thereby constitute persons in the sense that they can be held as moral agents is unsupported in Bratman's view. Precisely what it is that Bratman argues against Searle is not yet clear in the sense that the ambiguity in Searle's argument possibly makes Bratman's position a persistent defense of I-mode intentionality rather than an active deconstruction of Searle's position. Bratman's position is more than a simple rejection of Searle's position as unpersuasive, but the confused state of Searle's analysis of social facts and the we-mode collective intentionality he asserts wants clarification in congruence with a further assessment of the veracity of Bratman's adherence to I-mode intentionality.

This segment of this chapter falls short of the aim of precisely locating the argument between Searle and Bratman, but it furnishes the realization that there exists a great deal of confusion and ambiguity with respect to all the formulations of collective intention. The status and consequences of the debate about collective intention, joint social action and moral responsibility are quite

unclear as is the nature and the role of collective intention in joint action. Can we say anything morally definitive about Auschwitz and Dresden in terms of collective intention that is more fully informed by the debate between Searle and Bratman? I think that more fully informed statement is not yet possible. But it is clear that something like collective intentions act to organize and coordinate collective action and in addition for Searle, collective intention creates social and institutional facts. Further analysis of these can continue to raise the most important moral questions. All of this does not go far enough in explaining why we are able, or not, to assign culpability or moral responsibility to collective entities when they do wrong.

Both Searle's and Bratman's arguments ultimately rest on individual intention. Examining the foundations of Course-of-Action theories of intention are where I will turn next to explore the possibility of finding a grounding for collective intention that does not rely at its root on individual intention.

### ***Course-of-Action***

Course-of-Action does not appear to fit with a Nexus-of Contracts legal theory of the corporation as it is described in Chapter 3. Under a Nexus-of Contracts theory a corporation reduces to individual agents as the only responsible primitives for moral responsibility, but still gives rights to corporations on personhood grounds. There are specific problems with the relationship between Nexus-of Contracts and Course-of-Action. Nexus-of Contracts theory does not reflect the reality of corporations as collectively intentional systems and collections of integrated systems that have real effects and have moral standing in a moral community as I will show in Chapter 5. Non-agential intentional systems are how corporations as complex organizations get things done, but they can also be held accountable on the basis of their other characteristics. Following a Course-of-Action perspective an agent—in the conventional sense—is not necessary for an ascription of corporate moral responsibility on the grounds that a corporate non-agential intentional system can pursue a

Course-of-Action and answer for what it does.

In contrast to the individual, cognitive state-of-mind position described above, an alternative stance on intention argues that there is something missing if intention is viewed only as an agent's possession of an attitude that offers a deliberate goal-oriented plan. This alternative view says that intention is not a mental state or a combination of beliefs and desires. To intend, it is claimed, is for an agent to adopt a course of action to do something. It is incidental that the agent has a purpose in doing so, that is, has specified a purpose for the intention with which something is done. What is important in this is that nothing has to be added to the "intention to do something" to make it an intention, no state-of-mind, no commitments, no disposition. Adopting a course of action on this view is independent of those things about the intention, or the kind of thing intention is; it is intention itself that is described by adopting a course of action (Scheer 2004).

A conceptual confusion results when state-of-mind theory is used to explain corporate collective intention, and this confusion is evident in both everyday practice and philosophical theory. We see this in practice by the way people ordinarily talk about corporations, the explanations people give for what corporations do and the reasons they attribute to those actions. And when a corporation is implicated in an action for which it is alleged to be legally, socially or morally responsible people often say that the corporation itself deliberately and mindfully intended the action. It is said that the corporation—and they speak of it as a unitary entity—did so knowingly or that it audaciously flouted the law or the norms that it collectively knew, or ought to have known, that constrain or prohibit such activity. We say things like "GiantVampireSquid Inc. acted wrongfully, they did so with deliberate intention and they benefitted from their action while we suffered damage and losses. GiantVampireSquid Inc. ought to be held accountable for what it did". In the everyday language commonly used in such situations, allegations appear to be levelled at the corporate entities themselves, rather than the individual human beings within the corporation who committed the

wrongful action (assuming it is possible that those individuals can be identified). In this informal usage the intentions of the corporation behind the actions are attributed to the state of mind of the corporation itself, just as they would be to a natural human agent. This seems to us at one level to be a valid description of the relationship between the entity, the intention, the action, the results and the allegation of responsibility. But on another level and under closer examination, a complex and confounding confusion is revealed in such treatment of corporate agents. While it is said that the corporation has intentions, beliefs and desires as well as having knowledge and making decisions the notion that a corporation has a mind in the way that a natural human being does would probably not be robustly defended by most people. If questioned, most people would say that, no, a corporation does not have a mind of its own, we just speak of it that way as a convenience. That is to say, corporations don't have "wetware", a term used to describe the brain, mind and central nervous system of a living human being. Speaking that way is an efficient shorthand that represents the minds and actions of those individual human beings within the corporation who are actually endowed with minds and who are capable of intending. Yet, and equally undeniably, corporations as collectively intentional groups are real and do have real consequences in the real world adding to the potential for confusion.

The confusion about mindedness is said to lie in our speaking of corporations one way, that they have states of mind, that they intend to do things, and they act on those intentions. But, at the same time, we know in another way that a corporation, an inanimate legal fiction, does not have a mind capable of a mental state. It cannot form intentions, want things, hold beliefs, or make unitary decisions of its own as if it were analogous to an agential human being. Can we make sense of this confused state of affairs?

There is another way of looking at this. Suppose that people use the convenience of ordinary speech to describe the damages that issue from corporate action and so they speak as if the

offending agent were the corporation simpliciter. But, at the same time, those people think that in the end the action ascribed to the corporation actually reduces to individuals within the corporation. Thus, there is the possibility of an interpretation that is not so confused, but merely a reflection of how, on the one hand, people ordinarily and conveniently talk about the world of collective agents and attribute intention to them. And, on the other hand, those same people seek to ascribe actual culpability to discrete, identifiable individuals within the corporation as the guilty parties for wrongful actions. That would leave us with the convenience of speaking descriptively of the corporation—as a whole—as a culpable agent, while we empirically attribute the actual wrongdoing to identifiable individual human beings. This approach suggests that there can be very little difference between the corporation and the guilty individuals in the ordinary speech of the aggrieved individuals who suffer from intentional corporate wrongdoing. This is because they can readily distinguish between the semantic convenience of naming the corporation that collectively and intentionally acts as if it had a mind of its own on the one hand, and on the other blaming the actual individual human beings, who plan and perpetrate the action whether or not they can be identified and charged with responsibility.

This describes the corporation (the whole entity) as an expeditious stand-in (a form of synecdoche) for the guilty parties (individual human beings). For example, we might hear someone say: “It was Volkswagen that is to blame for the nitrogen oxide emissions test cheating scandal and VW should take collective responsibility”. Here again there is the question of whether corporations and individuals must have the same kind of mental state to formulate and execute an action. This demands a peculiar symmetry between the organization and its individuals for us to say that when the organization acted it did so with a state of mind.

When individuals know, but corporations don’t: these are cases where individual agents have knowledge of intentionally bad practices but the corporation as a whole (or its relevant functional

subunits) does not know, support or endorse the action. It seems in some recent cases of financial sector fraud that individual agents may have had a state of mind productive of decisions and actions leading to fraudulent corporate action, for example in cases of mis-selling of financial products or the manipulation of interest rates by other banks. But the corporation itself did not have that same state of mind, say, because the scheme may have been secret or, closely held within a subunit of the organization. Or the fraud may have been so technically complex or intricate that it could not have been sufficiently understood elsewhere within the organization or by its officers, as in some cases of algorithmic trading in securities markets. While it might be possible to say that the corporation “knew”, despite that knowledge it did not actually have control, because control is something associated with a state-of-mind condition for the agent. The CEO (an individual human being) may be an expeditious stand-in (a form of metonymy) for the corporation (the whole entity). For example, someone might say: “Martin Winterkorn, the former CEO of Volkswagen, as the top officer, is responsible for the nitrogen oxide emissions cheating scandal. He should have known, and if he did not, then he is equally culpable as if he did”.

When corporations know, but individuals don’t: these are cases where the practices are part of the operations, culture and ethos of the corporation. For example, consider a case of financial fraud where the corporation may contrive to commit wrongful actions and does so without the knowledge of many or most of the individuals within the organization. In the example of Wells Fargo Bank that opened this chapter, there was fraudulent cross-selling of financial products and services as practiced within a sub-unit of the bank, while the upper management apparently knew about and enforced the incentive structure that compelled employees in the unit to conform to corporate cultural practices. These were practices that upper management must have known would defraud retail customers.

People use language that indicates they seem to think about and treat the action of corporations in

ways very similar to how they treat individual human beings. But this process does not necessarily lead them to believe that corporations have minds, because people can and do appropriately distinguish between these different kinds of agents without confusion. What they think about corporations as a matter of convenience or efficiency is different from what they understand corporations to be ontologically and the kinds of things corporations can believe, desire or intend and bear responsibility for. In the same fashion, people think about human beings and their capabilities to put them into an appropriate ontological category and ascribe responsibilities to them for what they intend, believe, decide and do. Ascription of moral, social and economic responsibilities does not necessarily depend on a determination of a corporate state of mind when there is an issue of harm and our reaction to it; it is in our nature to feel anger and resentment and to demand remedy. In contrast, it may be necessary to prove a guilty state-of-mind (*mens rea*) in legal cases.

Ontologies do not matter here; what matters is what is intentionally done, not the nature of the thing doing it, and not our conceptualization of the intentional state of that thing. There is a growing need for an appropriate response to intentionally harmful corporate actions because the consequences of actions by financial sector MNCs are increasingly widespread and damaging. But to attempt to respond by conceptualizing the corporation as if it were identical (or nearly so) to an individual, mindful human being cannot meet criteria of conceptual coherence. Both corporations and human beings are complex entities, but they are so in different ways. To treat them as if they were identical, or sufficiently similar and thus are both capable of state-of-mind, cannot resolve the issue of moral responsibility. The essence of the issue here is that as human beings we respond to corporations as we do to other individual human beings—as if they were persons with minds that have states. The emphasis is on the inappropriateness of the response from those aggrieved by corporations treating corporations as if they were individuals with states-of-mind.

Intentions tell us about reasons that lie behind actions taken, whether they are founded on belief or desire, or goals or another kind of mental state. These inquiries about reasons are different from merely asserting that a corporation is responsible, or simply blaming it for its irresponsibility or negligence. But reasons and responsibilities are connected through the identifiable relationship of what corporations chose to do that is based on their planning and execution as intentional collective conduct of an intentional system.

Intention is conceptually difficult when it is applied directly from autonomous individuals to corporations. It is complex and analysis of collective intention has relied too heavily on finding analogies with individual natural persons, resulting in endless debate, but analogies cannot resolve pressing issues of harmful corporate action. There are other practical policies for resolving harmful corporate social practices. One way is by simply blaming and punishing errant corporations through a crude utilitarianism in which the greatest good is to diminish harmful actions to the greatest extent possible. This would afford the greatest good to be realized, but in a negative way, the maximal reduction of harm. This kind of utilitarianism encounters problems, however, when there is unjustifiable collateral damage to employees, families, communities and those who are negatively affected but not culpable for the wrongful corporate action. Although the utilitarian approach may be productive and effective in punishing, it comes at great cost and does not necessarily yield a deterrent effect on future action by other corporate agents. It may instead simply make them more devious (Wilmot 2001).

There is a middle way that focuses away from the ontology of the corporation. This middle way is not concerned with the mental state of collective agents. It is a methodology of what they intentionally do, the results and the meaning of those actions for human communities and the public good. This keeps us away from anthropomorphizing the corporate agent and treats it as another, artificial kind of agent, but not one that has the complete agency of a human being.



Consequent to the granting of rights and personhood to corporations they gain a type of autonomy independent of their individual members that endows them with a legitimate purpose. It is this contrivance of corporate purpose that differentiates them from human beings (they are not ends in themselves as are natural persons) but still leaves them subject to ascriptions of a morality of phenomena—the outcomes themselves. Even if their actions are in accord with their designated purpose the results may inculcate them as intentional systems for being deliberately irresponsible. What is to be distinguished here is that the exposure to moral responsibility arises not only from the action in which they engage as intentional systems, but the consequence for those affected. The morality of results is relevant to corporate action and its consequences just as is the morality of intention and action.

What ultimately matters both normatively and concretely in the approach I am calling a middle way is future results, i.e., that no future wrong or harm is caused. Rather than seeking simple retribution through punishment, this can be considered to have the greater utility, because it has the potential to prevent harmful action while looking forward to relieving unknown numbers of victimization, rather than a backward-looking punishment on behalf of those who may be identifiably harmed by previous actions. This does carry a risk of injustice for the corporation. The price of prevention may be to strip the corporation of its capacity to exercise autonomy with respect to its designated purpose. As a preventative this could be done on behalf of communities or globally even if that means suspending or vacating a corporation's license or legal charter. Note that this does not absolve the individuals involved in wrongdoing in their corporate roles. If the corporation is held responsible there is no shifting away of answerability such that culpable individuals can escape liability. The middle way suggests that there is an answer to the question of whether it is better to protect an uncertain number of individuals or the community against future harms through prevention rather than the utilitarian aim for the greatest decrease of harm as the

greatest good that can be done.

## **Conclusion**

In this chapter I have discussed approaches to individual and collective intention, and demonstrate the inadequacy of theories of collective intention that remain grounded in a state of mind conceptualization. In Chapter 5-Responsibility I turn to alternative theories that are based on course-of-action because these approaches do not rely on the state of mind of natural persons as agents. I think there are possibilities for assigning corporate moral responsibility to non-agential intentional systems even if they are not agents and not entities, but because they are corporate systems by which corporations seek to achieve their aims.

In Chapter 5 I will examine the issue of corporate responsibility for what corporations intentionally do rather than what they are. I will show that there is a reaction among those who, to whatever degree they are affected, feel that things are out of balance, and there is a sense of unfairness and injustice in giving personhood status to powerful superorganisms such as multinational and transnational corporations. What happened in the specific instance of the GFC brings the confused legal concept of corporate personhood under much closer scrutiny. Having used their legal personhood rights to gain great power to control and manipulate the global financial system, corporations were able to avoid the burden of being held morally responsible for the harms done and to very largely also avoid and evade legal, social and economic responsibilities. Clearly, and on a world-wide scale, there has been an expression of moral indignation and outrage at this imbalance between corporate rights and responsibilities. It will be a central topic of Chapter 5 to examine how we might understand those reactions and issues.

## CHAPTER 5-RESPONSIBILITY

### Introduction

In this chapter, I begin by returning to the GFC case study. The main point of the case study is to demonstrate intention by corporations, as this grounds the need to assign corporate moral responsibility to them. I then turn to approaches to ascriptions of moral responsibility. Approaches that depend on the metaphysics of personhood of corporations, and utilitarianism are found wanting. A third approach, Strawson's expressivism, extended to non-agential intentional systems, is a more practical solution.

In Chapter 4 I have shown how intentional collective action by financial sector corporations led to the GFC and despite the clear evidence of fraud, misrepresentation and deception those who ought to be held responsible have very largely escaped any significant sanction or penalty. It might be fairly asked if the political upheaval of the following decade would have occurred had the GFC not happened and the global effects been so pervasive and wide-spread. It is doubtful that the populism and discontent that we witness now would be pronounced to the degree they are if there had not been the traumatizing decline in the standard of living for so many. The election of Donald Trump as President of the US and the referendum vote for Brexit in the UK are two events that are claimed to be a direct result of the mishandling of the GFC and the continuing bonuses and extravagant compensation in the financial sector that is perceived to have caused the problem (Treanor 2017). These realities have raised many questions in popular media about the social utility of investment banking (Cassidy 2010).

The question of financial sector corporate moral responsibility is based on an assumption. The question assumes that the interests of individuals and the public interest are both shared and pursued in common through social cooperation, but also that those interests can be victimised by

the actions of social organizations just as they can be by individuals. This is also true of fraud, deception, excessive risk behaviour and other dangerous practices in the financial sector. Moral conduct of systemically important social organisations is a shared expectation among individuals in social systems to reduce economic uncertainty, financial instability and to promote social and personal well-being. People perceive what corporations ought to do and not do as a matter of norms and shared expectations for the good of all, and they compare this to what corporations actually do and the effects upon the commons. To this people attach moral blame if the outcomes are negative and if those vulnerable to corporate action are intentionally victimised. Our relationships to social institutions are mediated by individual and collective reflection (through political and social discourse) and we make normative assessments through that reflection about those institutions. Financial sector corporations and individuals have experienced extraordinary gains in periods of economic booms, but also have been found culpable in fomenting financial crises. Yet they seem to enjoy immunity from the harms they do and, even then, continue to realise great gains. This mocks the morals and normative expectations of everyone and the communities that are victimized. Naturally, there is anger that eventually gives rise to strong reactive attitudes, active resistance, frustration on a collective scale, mass movements, and demands for justice, if not for revenge.

Since the 1980s financial institutions have increasingly and systemically come to dominate global finance, economics, trade and sovereign political power. This dominance is transforming society at both the macroeconomic and the microeconomic level by altering not only the role of the state, but the structure of financial markets, how they function and determines the behavior of public corporations as well as public and private economic policy at the legal, social and political levels. Financialization describes the process in which all value is reduced to that of exchange, particularly through financial corporations, their instruments and markets. Those instruments can be tangible

or intangible, for example, futures trading in commodities or bonds, or current contracts as promises to pay between parties. Hence, the logic of financialization is to reduce to a tradable instrument and make marketable any artefact of production or service, including currencies, as, for example, in foreign exchange in the form of money markets. All of this is alleged by its proponents to be aimed at making markets for trading financial instruments more efficient and more profitable through removal of barriers to capital flows (capital account liberalization) on a global basis.

Corporations are like markets in that both of them are useful economic, financial and social phenomena. Among their many useful aspects corporations are social mechanisms for achieving efficiencies in the acquisition, distribution and use of resources, organization of skills and planning and other aims. And as with markets there are questions about the meaning of corporations and their impact on our lives. This exposes the existential side of corporations in respect to the basic structure of society – not just economic structure and institutions. It raises questions that cannot be answered by economics alone, for example, the nature of economic agency, the impact of corporations on social relations, or the meaning of corporations for understanding freedom.

Questions of moral judgement enter when we pose descriptive and normative questions of what markets and corporations should look like, what they ought and ought not to do and how we should relate to them and they to us individually and collectively. It is clear that market principles (of exchange) should not be allowed everywhere, for instance in the ownership and trading of human beings or body parts as a form of property or in corporate takings of life's essentials such as access to potable water. In asking what the limits are of markets and what is acceptably salable, we try to find where markets' normative limits lie. We need a philosophical treatment of markets and corporations to address their meaning in our lives. In doing this we get better theories and better self-understanding, but we also can avoid significant negatives including repeated global financial crises with their impact on political processes and on individuals and their communities. The

question of how we can reasonably live with global markets and with multinational corporations has particular urgency given their growing power, influence and consequences.

Because they are social phenomena there are other important aspects of the economic world and markets that are not only economic but social and political. For example, in the GFC both housing markets and financial corporations went badly wrong. While it is essential to have the rule of law to control the operations of markets, the limitations of legal systems (as I have tried to make clear in Chapter 3) make it imperative that there be other ways of managing and insuring that markets and corporations remain trustworthy and function to serve the common good. To answer questions of equality, justice and freedom requires not just economic theory, but also political, social and moral theory as well.

We need a robust blend of theory and practice, including moral theory, in addressing markets and corporations because in an imperfect world markets and corporations are not perfectly competitive. It will not yield answers to the questions posed by dysfunctional market institutions if society, its legal constraints and regulations are charged as the source of imperfect competition and cause a confounding of free markets, but never the markets themselves as sources of problems.

It would not be possible to provide a comprehensive account of financialization in this chapter without giving the whole thesis over to the concept. It is possible though to indicate that international finance has come to have very significant socio-economic power and with that it has gained the capacity to influence if not dictate legislation and political power in favor of financial institutions to the detriment of economic stability and the victimization of sovereignties and their subjects. In the end, in attempting to resolve the crisis, it is the subjects of sovereignties, the taxpayers and those who suffer the consequences of austerity programs that have been made to carry the burden of bailing-out failing financial sector institutions and the global financial system as a whole.

## **Pathologies of Financialization**

Financialization means seeing the world wholly through the lens of financial abstractions because it enables an interpretation of all social and economic relationships as forms of financial exchange.

Financialization is a totalizing market culture in the sense that markets enclose traditional social and economic connections that people have within their communities. These have been known for centuries as the commons, although they are now typically thought of as land and other tangible property held or used in common. These connections have been expressed in various forms but have the character of systems of socially cooperative institutions that provide for shared purposes. These commons have persisted over long historical periods despite challenges from systems of power such as feudalism or capitalism that would disrupt or deform them to other purposes. These commons are methods for human beings to cooperate. They are ancient traditions that serve to protect the shared interests of the many and for individuals and groups in the future. What are the social functions of the commons? Subsistence through traditions of agriculture and forms of work, labor practices, access to resources, a form of social power, social identity, equality of customs and habits of ancient traditions of access to land, water, and other means of reproduction of daily life. The commons is socially cohesive and sustaining triad of natural resources, the common people and traditional social practices. Under emergent capitalism this stabilizing system was subject to a process of commoditization to meet the needs of the nascent industrial order.

There are very different priorities for each type of system – the commons serves different needs and provides different resources for a broader scope of human interests than the narrower interests and aims of power systems. Of course, there is creative tension between the commons and power systems and although these are interdependent, capitalism, especially in the form of neoliberalism, seeks to dominate and exploit the commons for its own interests to the exclusion of other human interests. There are complex relationships involved with individualism (of power systems) and

collectivism of the commons. They coexist but neoliberalism seeks to make them mutually exclusive. These are the pathologies of market enclosures as a form of financialization characterized by the private commoditization of resources that are shared in common as public goods.

Neoliberalism is an aberration in human history compared to the long traditions of the commons. The notions of neo-classical economics that assume individual rational self-interest and materialism with unlimited appetites for possessions and goods are not universal attributes of human beings. These neo-classical notions are not the rationality of historical human experience and human nature. Cooperation and altruism are advantageous for groups by preserving association and mutual aid necessary for the survival and flourishing of social groups. These may disadvantage individuals but favor the fortunes of collectives. We observe that rather than being driven by fear and power relations, people seem to be naturally empathic and mutually supportive especially in episodes of crisis and emergencies. The evidence for this is found in collective responses to natural disasters and other forms of adversity where strong norms are brought to bear against those who exploit such situations for their own advantage.

Financialization as a totalizing, enclosing market culture is short-term and ultimately self-defeating as it seeks ever shorter cycles of gain and exploitation. The commons, in contrast, represents a long-term view of human existence and the benefits of thinking beyond immediate needs and goals. Historically, we find in legal traditions such as Roman law in regard to property rights and the Magna Carta with respect to the rights of subjects were responses to arbitrary exercises of individual power and continue to serve as precedents for contemporary legal systems and human rights regimes. This protects customary rights against the prerogatives of the powerful and provides legal limitations on presumptions of absolute power, depredations upon the commons and protects the subsistence of the vulnerable against state-sponsored privatization. In our contemporary social order of neoliberalism market enclosure means a transition away from custom and tradition



strengthened by individual and social memory to codified legal systems of written records.

There is among financial elites a temptation to withdraw from direct participation the social and political world into a kind of gated community of financial institutions, private institutions and protective bubbles that insulate financial sector agents from the cacophony of competing interests in the social world. This can be described as the paradigmatic unity of neoliberalism and the financialization of relationships. This withdrawal into financial abstractions and pursuit of a single interest – to make as much money as possible without regard for collateral damage in the wider society – creates a pernicious kind of detachment from the realities of social existence and leads to treating all social institutions and experiences as means to the end of profitability, to the exclusion of all other ends. This raises important questions about financialization and sustainability, especially in respect to the commons.

There are foreseeable problems and limitations of financialization; financialization and sustainability are incompatible because there is in a single focus on ever-shorter cycles of financial performance, a resulting neglect if not total loss of emphasis on investment for innovation, on improved manufacturing, and future product development. Long-term profitability and capacity are necessarily sacrificed for short-term financial gain. This engenders a race to the bottom of shorter and shorter financial cycles that progressively focus on the demand for gains that are possible now rather than a view for the future, its potential and its possibilities. The process of change from feudalism has been transformed from a negative perception of temporal change representing processes of decline and decay into a positive sense of progress and growth under industrial capitalism. The organic cycle of seasons has been transformed to the rationalized discipline of the clock. But there are other consequences of pathological financialization that affect communities, the public good, and the commons.

Regulation has been a compensatory but inadequate answer to the task of addressing the problems

and predatory practices of corporations that displace the costs of production and consumption onto the environment and communities. As with the GFC when the risks went bad, the public shouldered the burden of rescue while the formal legal system could not or was not allowed to place those burdens on the perpetrators. Thus, the commons was twice victimized, once by corporate financial action and again to recover the stability of the economic order.

Partly this is due to the vulnerability of the regulatory mechanisms to corruption and corporate capture. The state as a fiduciary agent cannot ignore these problems but is diverted in the process by industry concerns about slowing economic growth and violating the principles of free markets. Regulation of the formal legal kind cannot keep up with the emerging problems and risks and this is especially the case in the financial sector. There is a persistent cycle of moral and economic crisis in the absence of a vital and strongly enforced sense of the public good and the integrity of the commons.

### **Metaphysics, Utilitarianism and Strawson's Expressivism**

In cases like the GFC, serious, long-term harms issue from intentional corporate action with substantial costs, both monetary and non-monetary. Those costs are all too often largely borne by those who are innocent of either participation or complicity in the action. In these cases, what can be done as prevention or as remedy becomes a crucial moral question. I propose that in addition to legal and other avenues there are three possible approaches to holding corporations morally responsible. One would be to resolve the question of the metaphysics of corporate personhood. The second would be to apply utilitarianism to corporate action in the interest of accomplishing a remedial sanctioning and preventative cleansing of the temptation to intentional but harmful outcomes. The third approach is to acknowledge that it is in our nature to react with expressions of resentment, anger and an urge to punish wrong-doers to protect the social fabric and community cohesion from those who would sacrifice it to their own selfish interests. I will refer to the third

option as P. F. Strawson's expressivism. This view shifts the focus from the corporation to those affected but helps to shed light on corporate action and responsibility. In all three approaches attaching moral responsibility to corporations is an effective possibility and together have a formidable practical potential if we concede a corporation to be a morally responsible kind of agent, but one that does not conform to conventional individual definitions of agent status. In this concession, that moral responsibility does not rely exclusively on reduction to individual participants, it is possible to broaden what corporations are responsible for beyond those intentions, acts and omissions ascribed to individual human beings, and these three arguments demonstrate that corporations are indeed burdened with responsibility.

Because there are limitations with the first two approaches, I argue that an extended version of Strawson's expressivism is the best way forward for corporate moral responsibility.<sup>62</sup> Actions that we take with respect to corporations and corporate moral responsibility are several. Our sustained reflection on the nature of corporations is a form of action, but it has not yielded a convincing solution to the problem of corporate moral responsibility because the problem of agency and personhood seems to be intractable. Our focus on the consequences of corporate action, their doing of intentional, careless or reckless harm as well as the consequences of our actions in holding corporations responsible are also forms of action. But merely reflecting and debating on the one hand, and utilitarianism for the simple good of punishment on the other hand in Strawson's view leaves out something essential. It is part of our being human—we are naturally reactive creatures and it is in our nature to react with resentment when we are intentionally harmed. We forfeit how we respond to and interact with the world if we choose a blunt utilitarianism. To take a simplistically blunt approach toward corporate action in circumstances fraught with anger and

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<sup>62</sup>I do not wish to engage in an explanation or analysis of Strawson's expressivism. I employ the term expressivism as applied to Strawson and how he uses 'reactive practices' to describe responses to the behavior of others. Reactive practices as I think of them here are retributive and associated with justification for punishment. The reader is referred to Metz for more on the nature of reactive practices and Strawsonian expressivism (Metz 2008).

resentment present significant deficiencies that are identified by Strawson. If we do try to assign corporate moral responsibility we must have good reasons to do so and good outcomes (utility) if assignments of corporate moral responsibility are made. Good reasons with respect to the nature of corporations and the issue of entity-agency might be that corporations are indeed agents and have metaphysical characteristics analogous to human beings. But, again, this is a seemingly interminable debate and has done little, if anything, with respect to positive actions to protect essential public goods. Good outcomes with respect to utilitarianism would concentrate on consequences and avoid the metaphysics. This changes the question about corporate moral responsibility from one about the nature of the corporation to the possibility of achieving beneficial results by holding corporations responsible for what they do. Strawson, however, objects to utilitarianism because it leaves out essential aspects of our humanity and our experience of the world (Silver 2005, p. 291). Strawson's concern in his article was with individuals, not groups, collectives or corporations. And while corporations and people do not act in precisely the same ways, corporations do act and have real consequences in the real world. Those consequences, when they reach the scale of the GFC, demand that normative judgements be laid against corporations and that action be taken to protect the social order and specifically the essential public good of financial stability.

The subject of this chapter is whether corporations can be morally responsible for their actions. In his article, Silver's question is not whether groups can be morally responsible, but what group responsibility means for the members of the group. Silver assumes groups are morally responsible, then asks: what does that mean for participants? I am posing a different question: is there a way to hold corporations responsible that does not rely on their theoretically indeterminate nature or on a punitive but deficient utilitarianism? While corporations can be argued as deficient (lacking free will, bodies, mental states, intentional states) to carry the kind of moral responsibility that human

beings do as natural persons, Silver argues corporations can bear a kind of moral responsibility. That is, there is more than one kind of moral responsibility than that ascribed to natural person-agents. The standard story is that corporations are either just like human beings with respect to moral responsibility (analogous to the metaphysics of natural persons) or they are not; if they are not, then they have no moral standing and therefore cannot be morally responsible. It seems that we have two choices: we are left with either treating corporations as morally responsible but as a different, collective, corporate kind of moral agent as distinct from individual human beings. Or we can say that corporations are not collective moral agents and thus cannot be held morally responsible, but they can be held collectively accountable for their actions. The array of reactions we have include folk corporate reactive attitudes – those most people have before philosophically analyzing and critiquing their attitudes about corporate action. There are individual reactive attitudes – those we direct toward individuals for their personal actions. And there are collective reactive attitudes – those we direct toward groups for their collective actions. The internal structure of corporations (the culture analogous to individual character that influences corporate personnel) provides the conditions for rational warrant (the appropriate human response to actions, states of things; epistemic justification, aimed at truth) of our reactive attitudes to corporate action and its consequences.

To come to grips with this problem I am adapting Strawson's argument about individuals to corporations, but I will address corporations as non-agential intentional systems. We could abstain from directing our natural human reactive attitudes toward corporations and hold it to be inappropriate to do so based on their nature as non-entity fictions. We could instead use a crude utilitarianism based on the good consequences that would follow if we were to simply blame them for wrong-doing, but we would lose something essential about our humanity and impoverish how we interact with the world. But it is not possible to hold corporations responsible as we do human

beings given the indeterminacy of their person-agency. It may be possible to hold them morally responsible another way—through their characteristics as non-agential intentional systems, which I will describe below.

Strawson's expressivist treatment of reactive attitudes engenders a powerful practical proposal for how we might approach issues of corporate moral responsibility. Those reactive attitudes express our humanity, our relations with each other and our institutions, and engage us with the world and the forces and factors within it. In the case of corporate anormative action this is a confrontation between those affected by corporate action and that which causes those outcomes.

### **Non-agential Intentional Systems, Course-of-Action and Corporate Moral Responsibility**

An alternative to ascriptions of corporate moral responsibility as if corporations were natural persons or legal persons is possible through the use of the concept of non-agential intentional systems. Reflecting on the nature of corporations is not the main issue in this chapter as the metaphysical question about the nature of corporations appears to be interminable. This metaphysical enigma is aggravated by indeterminacy in jurisprudence and legal theory about corporations. Indeterminacy in Nexus-of-Contracts legal theory specifically allows corporations to escape moral responsibility as I have explained in Chapter 3. In this chapter reflecting on whether to act by ascribing moral responsibility is the focal issue and a practical possibility for corporate action. My aim is not to find the single best theory or approach to corporate personhood or corporate moral responsibility, but to understand and show how corporations might be vulnerable to assignments of moral responsibility at all. The concept of non-agential intentional systems offers a way to hold corporations responsible without recourse to metaphysics or a crude utilitarianism. A non-agential intentional system is a social construction, but it embraces Strawson's ideas about how it is natural for human beings to react to intentional harms as they do.

In this part of the chapter I am arguing for an alternative to the standard view of personhood, agency and corporate moral responsibility. The standard view claims we must find that either corporations are in some metaphysical sense sufficiently analogous to people so that they can be treated as ontological primitives, or that any assignment must reduce to moral responsibility of the individuals of which the corporation is comprised. Instead, I argue that it is both plausible and pragmatic for corporations to be understood as morally significant non-agential intentional systems and on that basis, they can be held morally responsible. The concepts involved in this are conceived not as a linear arrangement but are better thought of rather like a mesh or a network; there's not necessarily a fixed order in which these can be assembled for presentation. Thus, I begin with the concept of rational conversability. Then, because any corporation is a creature of moral agents, and although it is composed of individuals, when, in a hypothetical situation, the individual human beings are removed from the corporate entity the remainder, the residuum, can be seen as an enduring, morally significant, rationally conversable intentional system. The system that is created by moral agents makes the corporation addressable as a member of the moral community because it has the capacity for engaging in a moral conversation and giving reasons for the actions it takes.

Dempsey (Dempsey 2013) argues that if a corporation as it is created by moral agents is understood as a non-agential system, this is sufficient for it to be considered as morally significant. And moral significance is adequate to ground non-agential ascriptions of moral responsibilities to corporations. This raises important questions about whether moral responsibilities can only be borne by only one kind of agent, which in the case of corporations would be the individuals of which it is made. The argument here centres on whether the assumption that an entity must have moral agency is necessary to attributions of moral responsibility.

If we understand a corporation as a morally responsible kind of agent, but one that does not conform to conventional (individual) definitions of agent status, it may be possible to say that moral

responsibility does not rely exclusively on reductionism. This makes it possible also to broaden what corporations are responsible for beyond those intentions, acts and omissions ascribed to individual human beings. On this view I argue that because corporations are the creations of moral agents, and if they are rationally conversable as non-agential intentional systems and therefore addressable as members of the moral community, then as morally significant entities they can bear ascriptions of moral responsibility for the consequences of their actions. How can this be possible?

I said above that there would be a residuum remaining when the individual human beings belonging to a corporation are removed. We can adduce that residuum as an intentional system for two reasons. The first reason is that a corporation is formed by moral agents, i.e., the individuals that create it. They thereby endow it with some (but not all) of the characteristics of those by whom it was created. It is created, as it were, in the image of its creators, more and less. It is created as more than its creators because it can do things that individuals acting alone cannot. Also, a corporation does not die, it is not subject to the processes of ageing, it does not sleep or get sick as human beings do. Shareholders in corporations enjoy limited liability and corporations can be in many places at once. And a corporation is less than its creators because it does not have the metaphysical characteristics that are attributed to natural persons as agents. For example, it does not suffer shame or remorse.

The second reason is that a corporation is capable of rational pursuit of its aims and goals. For any natural agent reasoning is a required capability if that agent is to engage in a moral conversation with another agent about the reasons for what they decide to do. This is one form of reasoning. By contrast, to meet the requirement that an agent must be capable of reasoned moral conversation a corporation as an intentional and a rationally conversable residuum must be susceptible to moral address to be a member of the moral community. Moral address is the social process by which a moral community affected by the actions of another member holds that member responsible for



the consequences of its actions. Conversable rational agents, by engaging in moral conversations as a form of reasoning, are vulnerable to the judgements of the moral community to which they belong to give reasons in defence of or to explain what they do. Corporations are thus subject to what Strawson calls the Participant Reactive Attitude (Strawson 1962). This means that we do not treat corporations as mere objects, but as non-exempt from moral judgement and not excused from ascriptions of moral behaviour. As participants in the moral community they must answer to it.

I have said that it is possible for corporations to engage in rational moral address by being conversable with respect to their intentions (Ferejohn 2007), (Pettit 2013). Conversability about intentions in this context connotes the requirement that it is a unified agent that responds to arguments by members of a moral community that it explain or justify its actions with reasons. The moral community is composed of moral agents who are affected by the actions of another member, even if that other member is an intelligent entity (a kind of rational unitary agent that is capable of reasoned exchange and interpretable justification that makes sense of the action), but not a natural person. Collective intentional action by rational unitary entities normatively is expected to be conversably justified; typically, this is done through agential explanations of maximising welfare or by enhancing the public good, or at minimum, not conflicting with or obstructing those outcomes. In cases of group collective intentional action, only certain kinds of groups – “social integrates” – can act intentionally by integrating through internal processes the judgements of their individual members such that members regard the collective’s intentions as their own and are disposed to respond in concert with the group’s aims and ends. Rational unitary entities as social integrates are presumed to be capable of collectively intending to commit to patterns of behaviour that are consistent over long periods of time and to explain departures from predictable normative behaviour. Predictability is thought of as a consistency of behaviour. Consistency is essential for a corporation to do business; counterparties, clients and customers must be able to trust that the

corporation will predictably do what it says it collectively intends to do. The characteristics of corporations as collective intentional systems that I have cited are: corporate reasoning, moral address, moral significance and moral community membership for a conversable collective entity to be interpretable in its reason-giving by the members of the community. They are thus subject to the judgement of that moral community. A brief review of the grounding of non-agential intentional systems for moral responsibility highlights these characteristics. Corporate reasoning is the demonstration of rationality through decision systems and processes aimed at pursuit of their goals. Moral address treats corporations as conversable members of the moral community because they are morally significant as interpretable intentional systems. They are morally significant in the sense that they are capable of engaging in reasoned moral conversation about their intentions and actions. It is this capability for engagement and the exercise of conversability that makes them morally significant. As creations of moral agents, corporations have residual characteristics by which moral responsibility accrues to them as systems.

Following Dempsey (Dempsey 2013, p. 343) we find there are three conditions that must be met if a non-agential intentional system is to be morally responsible. First, it must be systemic in the sense that it applies a structure of rules to certain kinds of inputs that yields intended outputs characteristic pursuant to its intentions. The rule structure does not require that it have the status of a moral agent. It is a mechanistic system of inputs, rules and outputs.

Second, the residuum of the system is susceptible to responsibility that is unassignable to the system's creators or individual participants. System complexity is such that assignment of responsibility solely to individuals is not possible.<sup>63</sup> What Dempsey means here by complexity is spelled out as a creative process whereby a structure of rules is insufficient to anticipate all the

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<sup>63</sup>Weaver (Weaver 1998) addresses the problem of system complexity and assignment of responsibility to intentional systems as important aspects in the work Peter French (French 1979), (French 1984) Patricia Werhane (Werhane 1989) and J.E. Garrett (Garrett 1989).

uncertainties possible in the input-output process (Dempsey 2013, p. 342). The rules structure consequently undergoes development as unique and unexpected situations arise and it becomes more complex over time as it resolves problems and issues. System complexity becomes such that it is not possible to hold specific individuals responsible for creating and exercising the proliferation of rules in highly developed organisations. Nor is it possible to identify and hold responsible individuals for the ultimate outcomes that the rules, their interpretation and the unpredictability of what they produce as they aim at a corporation's intended goals. Considering the massive complexities of financial sector multinational corporations operating globally in a wide variety of legal jurisdictions and national cultures it is not difficult to understand the reality that these are systems beyond the simplicities of reductionist methodological individualism. For these two reasons, the residual aspect of the intentional system accrues to the collective rather than the individuals that comprise it. Were the individuals to be subtracted from the corporation, there would remain the rules-based complex system of inputs and outputs, and it is at that remainder that moral address can be directed.

Third, the corporation and its system of input-output rules is the creation of moral agents who pursue a line of action to achieve what they collectively intend. It is in this intentional act of creation and the operation of what is produced by it that susceptibility to moral responsibility occurs. By this they become morally addressable. Can a non-agential intentional system comply with demands that it respond to moral obligations when it is perceived to have intentionally acted anormatively? We suppose that non-agential intentional systems have the capacity for reflective self-expression and can answer the challenges brought against them as non-exempt members of the moral community.

What I have discussed is an alternative to the standard story of person-agent moral responsibility. While corporations as legal fictions are metaphysical creations, the inconclusive debate about their nature and the potential for harm they have demands that we find another way to hold them

responsible for their intentional action. I have considered if an organisation as a whole can meet the requirements to be held morally responsible. I am asking whether any corporation should be able to claim rights as a legal person (construed in the form of a collective entity) without bearing moral responsibility. Following Dennett's and Dempsey's arguments, I have argued that it is possible for non-agential intentional systems to collectively intend and bear moral responsibility. It is possible for them to meet the necessary conditions for moral address and as members of the moral community they bear moral responsibility.<sup>64</sup>

### **Course-of-Action, Nexus-of-Contracts and Non-agential Intentional Systems**

Nexus-of Contracts theory of the corporation does not appear to fit with a Course-of-Action view of collective intention because Nexus-of Contracts reduces corporations to individual agents as the only responsible primitives for moral responsibility. But this confuses the nature of corporations as legal persons with rights but not as responsible unitary entities. Nexus-of-Contracts gives property and liberty rights to corporations on personhood grounds which allows them to pursue their aims far beyond the original conception of the corporation as an instrument for public purposes and the common good.

Course-of-Action does not look at the nature of what a corporation is, but at what the corporation does and the consequences of that action. The specific problem(s) with the relationship between Nexus-of Contracts and Course-of-Action is that for a Nexus-of Contract theory of the firm there is no corporate entity to assign moral responsibility; only individual human beings have moral status and are susceptible to responsibility. Nexus-of Contracts theory does not reflect the reality of corporations as collectively intentional systems in pursuit of their own ends and as collections of

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<sup>64</sup>(Shoemaker 2007) does not specifically address collectives in his article about moral address and moral communities, but he does offer in some detail what constitutes a moral demand and who or what has the capacity to understand, apply and respond to moral reasons. This has application to non-agential intentional systems and their membership in a moral community based on their conversability and other attributes.

integrated systems with moral standing in a moral community. Non-agential intentional systems are how corporations as complex organizations follow a course of action to get things done. Under a Course-of-Action view an agent as conventionally understood is not necessary for corporate moral responsibility because a corporate non-agential intentional system can pursue a course of action. Course-of-Action offers a systems view of the problem of corporate action with non-agential intentional systems as the residual ontological primitive. Corporations can be better characterized not by metaphysical personhood and State-of-Mind theory, but by their non-agential intentional system aspects and as part of the moral community to promote and protect the public interest. Course-of-Action and a view of the corporation as a non-agential intentional system offers an urgently needed practical alternative to finding a mysterious nature analogous to a natural person in a legal fiction.

## **Conclusion**

The practical application of the idea of non-agential intentional systems rather than person-agents that I have discussed solves two problems. It sidesteps the endless debate about the metaphysics of corporate personhood, the nature of the corporation, its purpose and its social practices. It also avoids problems that might have worried Strawson if he had considered collectives in addition to individuals—our natural human reaction to corporate wrong-doing is validated and how we interact with the world is legitimated. In Chapter 6 I will again address the increasingly dangerous social and political practices of global financial sector corporations and some potential consequences of failing to hold them morally responsible due to indeterminacy about what they are rather than what they do.

## Chapter 6—Conclusion

In this thesis I have traced a thread of relationships among three principal philosophical issues. I began in the third chapter with the problem of corporate personhood and the legal history that has resulted in the world's most economically powerful nation, the United States, adopting a legal theory and practicing a judicial doctrine that gives corporations personhood rights but also treats them as non-entity fictions. This has resulted in corporations that under a Nexus-of-Contracts theory of the firm bear no substantive responsibility as distinct entities for the harms they do. They may be legally responsible and subject to social and other sanctions but in the litigious culture of the US the dominant concern is not with their moral responsibility but very largely with their legal obligations.

As an example of how an ascription of moral responsibility can arrive on the threshold of a corporation despite the company's contention that it is operating within the law, it is instructive to note a recent case from the United States. On 26 June of 2019 employees of Wayfair, a US-based home furnishings corporation walked out of its headquarters in Boston, Massachusetts. The employees were protesting the company's involvement in selling furniture (beds) to a US government contractor that operates detention facilities for migrant children on the US southern border (Taylor 2019). The walkout was preceded by a letter signed and sent by 500 of the employees to the management of the firm. The letter stated that the company was involved in an unethical practice in which the employees wanted no part and that the company ought not to engage. The company responded by stating that they were operating within the law and would not discriminate among its customers. Typically, the matter would then have gone to the firm's lawyers and if an action had been brought by the employees then a long, slow legal process would have ensued. Instead, by highlighting through social media the moral issues of detention of children, separation of families, poor and unhealthy conditions in the facilities, among other issues, the

company was forced to immediately desist from its practice of cooperating with the government's policies, its contractor and complicity in a treatment of children described as inhumane and cruel by members of Congress (Romero 2019). The negative publicity and threat of a consumer boycott added pressure to Wayfair to address the issue immediately (Maheshwari 2019). The potential effectiveness of this case illuminates both the potent impact of a charge of moral responsibility that can be brought against a corporation as well as the disutilities of a long, slow and expensive legal procedure.

In the forth chapter I connected the concept of personhood (and its strange divorce of corporate legal rights from corporate entity-responsibility) with the idea of collective intention. Through the discussion of the case study I have made clear that the GFC was the result of intentional action by both individuals and corporate financial institutions that exhibited a blatant disregard for prudent and responsible practices. At the same time those individuals and institutions have not only escaped meaningful punishment but continued to enjoy massive payouts and bonuses while globally the recovery from the crisis has left nations and their peoples suffering the effects of austerity and substantially retarded economic growth for over a decade since the onset of the GFC.

In the fifth chapter I addressed the problem of corporate moral responsibility and how confused corporate legal theory about these juristic persons has left financial sector corporations—for all practical purposes—immune from significant assignments of responsibility. I proposed a way to confront this by treating corporations not as analogues to agent-entities, a much-debated problem in metaphysics, but as non-agential systems capable not only of intentional action, but morally answerable due to their characteristics as collective intentional systems. The characteristics are: corporate reasoning, moral address, moral significance and moral community membership. These are the necessary elements for a conversable collective entity to be interpretable in its reason-giving by the members of the community. They are thus subject to the judgement of that

moral community.

In this sixth chapter I am concluding that an alternative to a standard view exists. That view claims we must find that either corporations are in some metaphysical sense sufficiently analogous to people so that they can be treated as ontological primitives, or that any assignment of responsibility must reduce to moral responsibility of the individuals of which the corporation is comprised as in Nexus-of-Contracts theory of the firm. Instead, I argue that not only is it both plausible and pragmatic for corporations to be understood as morally significant non-agential intentional systems, but on that basis they can be held morally responsible. Furthermore, in a practical sense there is no option to finding a way to rein in corporate action because it is doubtful another GFC could be resolved in the same way as that of 2008. It would simply be too costly. I return to the case study to make this point.

### **The Case Study Revisited**

The onset of the crisis, which was centered in the financial world and went largely unnoticed at first, spread rapidly until the afternoon of Tuesday, 7 August 2007, when the French bank BNP Paribas abruptly issued a short press release announcing the temporary suspension of three of their investment funds. The reason that BNP Paribas gave was their inability to reliably calculate the net asset value (NAV) of their three suspended funds. This was the consequence, they said, of "... [t]he complete evaporation of liquidity in certain market segments of the securitisation market in the United States [that] has made it impossible to value certain assets fairly regardless of their quality or credit rating" (Paribas 2007).

The inability of BNP Paribas to calculate these NAVs led to a slow cascade of failures that quickly accelerated in mid-summer of 2008, causing conditions in the financial sector to flip from a period of unprecedented, swaggering confidence to nearly outright panic. The very real threat of a global



financial meltdown was pointed toward not only specific financial markets, but much more broadly at the functioning of the world's systems of trade and commerce.

What began as a crisis of liquidity in one bank now threatened to freeze markets world-wide and became a global financial crisis. It is no exaggeration to say that the seizing up of financial markets left the world on the brink of disaster, a 'sudden stop'; one that would devastate economic activity. But this move by BNP Paribas was not the first or only warning in 2007 that something was going very wrong with the stability of the global financial system. In reality, the BNP Paribas fund suspension was phase two of this three phase crisis. But the fund suspension marked the start of the most important and decisive actions in response to it. This was when, on Thursday 9 August 2007, the Central European Bank urgently injected into the banking system what it hoped would be a €95 billion (\$131 billion) remedy for its liquidity problem (Tett 2007).<sup>65</sup> Phase one had begun earlier, in April of 2006.

Early in 2006 US housing prices, which in no circumstance were expected to ever go down, peaked and began their unprecedented descent (Sandbu 2017). The onset of illiquidity in the mortgage markets had become visible by late 2006. Mortgage bond originators had been issuing sub-prime, high risk, low quality loans, bundling them into highly (but misleadingly) rated bonds and then fraudulently selling those defective instruments on to other financial institutions. But as they did this, they were revealing to the purchasers neither the riskiness nor the intentionally misleading fabrication of the instruments.<sup>66</sup> While a few market observers were commenting on this behavior,

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<sup>65</sup>This event marked when 'sub-prime' became an evident systemic problem, but it does not indicate the definitive start of the global financial crisis of 2007-09. The global financial crisis began not with Bear Stearns or New Century, a US real estate investment trust (March 2007), but with BNP because that was when interbank funds spiked and liquidity was reduced or evaporated. It became systemic because it was a shift away from 'some guys losing money' in the markets to a case of illiquidity and asset valuation enigmas across institutions system-wide and globally. Redemption of these financial contracts then began to freeze on a broad scale.

<sup>66</sup>This category of loans, known as 'sub-prime', is central to understanding the GFC. The systematic mis-selling and misrepresentation of these instruments was part of the deliberate action taken by parties to the contracts. These proved toxic for global financial stability and economic security. The fabrication of 'sub-prime' instruments is crucial for understanding the legal, economic and moral issues involved in party-counterparty agreements and trust relationships.

by January of 2007 the reigning complacency in the wholesale mortgage markets was striking (Plender 2007a), (Plender 2007b).

Despite the evidence that hedge funds were underwriting increasing amounts of insurance in the derivatives markets (to cover potential losses) those hedge funds did not carry the burden of solvency margin requirements that insurers were required to meet. This should have put everyone in the industry on high alert. Not only government regulators but the financial industry as a whole including the credit rating houses and journalists should have raised a loud and sustained alarm that risky financial behavior was spinning out of control. Ominously, the pieces were falling into place for a violent, bearish reaction. Very soon, the violence commenced.

By February 2007 HSBC, the banking corporation, took an additional \$1.8 billion to cover mortgage instruments that had been issued to borrowers in the United States who were poor credit risks. At this time, it was claimed by market observers that mortgage repayment problems were evident only among a small segment of the borrowers in the category designated as sub-prime. But warning flags about deterioration in the overall market had already been raised. New Century Financial, the U.S. real estate investment trust that concentrated on less creditworthy borrowers for loans, had issued guidance to investors at the same time that it was restating its earnings figures because they had underestimated loan repurchase losses.

On Thursday, 8 February 2007 the ABX index (a credit derivatives index that tracked sub- prime mortgage bond risk) jumped significantly following the previous day's warning from HSBC and New Century that there were problems in their US sub-prime mortgage loan portfolios. But most importantly a collection of systemically important financial institutions (sifis) were also revealed at this time to have exposure to the deteriorating fundamentals in the US housing market.<sup>67</sup> Most

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<sup>67</sup>Systemically important financial institutions (sifis) are financial service providers. They are categorized institutionally in one of three ways. They are either depository (banks, trust and mortgage loan companies, and credit unions, among others) or contractual (insurance companies and pension funds) or investment institutions (investment banks, brokerages

prominent among these SIFIs were the investment banks Bear Stearns and Lehman Brothers.<sup>68</sup>

This revelation by the ABX index was partially responsible for precipitating Bear Stearns' \$3.2 billion bail-out in an effort to rescue one of its funds on Thursday, 22 June 2007. This was the largest bail-out of a hedge fund since Long-term Capital Management was rescued by a consortium of twelve lenders with \$3.6 billion in 1998. Negotiations to rescue another of Bear Stearns' funds at risk of a \$6 billion insolvency was by this time also underway. Despite desperate gestures to save its reputation, Bear Stearns was forced into this action as confidence in their solvency and trust between parties began to fail. But it was already too late. The third phase of the crisis followed the bursting of the asset bubble in housing mortgage lending. Investors, both individual and institutional, began selling with increasing urgency until panic set in as asset prices collapsed. We are confronted with many timelines that describe the genesis and unfolding of the GFC. The description I have given is a simplification of the sequence of essential events leading to the consequences we still grapple with more than 10 years after the price collapse in 2007 (Sandbu 2017).

What is important about the understanding of the GFC for ascriptions of responsibility is that so many years later so much remains unresolved about its causes. Economists, purported authorities on the origin of the crisis, still cannot explain with precision what happened and why. A simplistic explanation is still often heard that the root cause can be found in a piece of 1977 U.S. legislation, the Community Reinvestment Act (CRA), as amended in 1995. The amendment to the Act is alleged to have forced U.S. banks to lend billions to mainly poor black Americans. These loans, known disparagingly as 'Liar Loans' and guaranteed by Fannie Mae and Freddy Mac, started the explosion

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and underwriters). They are so important functionally to the financial system that, were they to fail, it would cause an economic-financial crisis. Thus, they are also referred to as TBTF ("Too Big to Fail").

<sup>68</sup>Other investment banks in this group were Citibank, Bank of America, Morgan Stanley, Merrill Lynch and Barclays Capital, but this does not begin to exhaust the list of financial sector institutions that were put at risk globally.

in dubious lending and the subsequent decay in financial stability. Or so it is claimed.<sup>69</sup> Setting aside this folk mythology of the US government forcing banks to offer mortgage loans to financially unfit borrowers, there are numerous candidate causes identified by serious observers to be the root source of the crisis. To demonstrate the problems of establishing the source of the GFC and how those lead to questions about grounding ascriptions of corporate moral responsibility the demonstration would have to answer “what happened” in the GFC in the sense of both what caused the crisis and who or what persons, institutions or systems were culpable legally, politically, socially and morally. Common knowledge would have us conclude that the consensus causal element was sub-prime mortgage finance fraud and the related financial instruments (derivatives, etc.) employed by financial sector institutions. This is a predominant and widely held view in the business literature; indeed, it is nearly exclusive. However, a closer reading reveals that the issue of what caused, as opposed to what triggered the GFC is examined in, inter alia, Andrew Lo, “Reading About the Financial Crisis: A Twenty-One-Book Review” (Lo 2012). The cause-trigger question is also treated at length in Mervyn King, *The End of Alchemy* (King 2017) and in Lisa Herzog, *Just Financial Markets: Finance in a Just Society* (Herzog 2017). These three extensive investigations all conclude that there is no consensus on a single cause of the GFC, but there is a collection of (disputed) elements that contributed to it. Arguing successfully that sub-prime mortgages were the principal trigger is possible, but they are not the sole, or even the principal, cause. Also, according to Mervyn King, the global financial crisis was not found in the intentional actions of a collection of bad institutions or individuals, but in the systems of financial capitalism (King 2017, p. 3).

The systems of financial capitalism are composed of a range of blameworthy elements. According to

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<sup>69</sup>This claim has been repeatedly debunked, but in true zombie-like fashion it returns and returns. The CRA cannot be the cause of the crisis because the CRA was in effect 10 full years before this form of lending began. Fannie Mae, the agency guaranteeing CRA loans as a government sponsored enterprise (GSE), was not prominent among the subprime mortgage boom lenders and got involved late in the process. Furthermore, most of the subprime loans were sourced in private entities and were not CRA loans, so by the number of loans and their dollar amounts they could not account for the causal effect attributed to them.

Lo, the principal elements of the GFC cited in the academic literature are: concentrated economic power in financial sector corporations (consolidation and political influence of the financial subculture), lack of transparency (including asymmetric information, concealment, distortion, deception), failures of financial regulation (inadequate monitoring, inconsistency, permissiveness, lobbying and wilful blindness), regulatory capture, global regulatory arbitrage, failures of financial corporation governance (poor risk management and excessive risk-taking, over-leveraging and insufficient capital reserves), contagion of bad ideas, under-pricing of risk, implicit government guarantees for bail-outs (moral hazard), predatory lending, deregulation and financialization (securitization) of the US economy, growing capital inflows to the US, shadow banking, executive compensation practices (short-termism), and weak US social policies leading to compensatory homeownership initiatives (as a compensation to counter-act rapidly rising inequality from diminishing access to education, lack of universal health cover, and declining democratic input). I am leaving out Lo's review of the journalistic accounts here because those focus on personalities and events, and offer little on underlying causes. There is also an additional argument that the financial systems were causal in the GFC, but it was at bottom politics that unleashed those systems.

### **Estimating the Costs of the Global Financial Crisis**

As I said above, the crisis that began in August 2007 may have led to the greatest transfer of wealth in human history. It may be true that the wealth transfer (including bank bail-outs) is the unprecedented, ongoing, and not yet complete. While it may not be possible to reach a precise assessment of the total monetary cost of the GFC, researchers at the Federal Reserve Bank of Dallas have made an attempt. Their study was done in part to counter the rhetoric of complaint from those in the financial sector that any government interference in resumption of their so-called free market financial practices would incur economic costs far in excess of the benefits of regulation. This, they say, would harm economic activity, retard investment, inhibit investors, shrink

employment, and other similar assertions. Atkinson, Luttrell and Rosenblum found in their research at the Dallas Federal Reserve that, using a conservative estimate, the costs of the GFC— including loss of economic output, financial wealth, psychological consequences, skill atrophy from extended unemployment and other costs—were from 40 to 90 percent of one year’s economic output (GDP) in the U.S. This conservative estimate translates to \$6 – \$14 trillion (in 2012 dollars) or between \$50,000 – \$120,000 that has been forgone by every household in the U.S.

Atkinson, Luttrell and Rosenblum also looked at the total value that would have been lost by the time the economy returned to a rate of growth equivalent to pre-crisis levels. They examined two possibilities. One possibility calculated that if resumption of the growth rate were to take until 2023 then the value lost would be 40-90 per cent of one year of US GDP. Again, in 2012 dollars this would fall somewhere between \$6-14tn. But considered on a per capita basis, this represents between \$19,000-45,000. The second possibility was by taking a more pessimistic posture the researchers found their assessment yields a loss of 65-165 percent of annual U.S. GDP, or \$25tn. This is an approximate, but astonishing \$80k per capita (Atkinson, Luttrell, and Rosenblum 2013). Yet these estimates assume a full return to normal growth, something which has not happened and, based on the historical record of successive financial crashes, seems not impossible but certainly highly unlikely to happen before the next crisis arrives.

Obviously, these figures are only for the U.S. If similar estimates were to be made that would include the total global impact the monetary losses alone must be astronomically high if they are on a similar scale to the U.S. domestic losses.<sup>70</sup> But these estimates of the negative consequences of the GFC are not comprehensive. They do not include either non-monetary costs or the future money costs of the GFC that are yet to be realized. To make estimates inclusive of non-monetary

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<sup>70</sup>This would include the costs to the people in the hardest-hit societies of Iceland, Ireland, Portugal, Spain and Greece. To cite these countries is not to diminish the total global costs, but merely to reemphasize the human, non-monetary toll taken by the crisis.

costs researchers would have to contend with reductions in living standards, wealth decline, deterioration in the well-being of the working population, and long-term joblessness.

For example, unemployment in the U.S. that rose to its maximum between 2008 and 2012 had the effect of reducing total wages by \$900bn, equivalent to an additional year of US economic activity (Porter 2014). Much more difficult is making estimates of the declines in physical and mental health as well as the unemployment effect that aggravates poverty and crime. Other effects are those on the structure of families and suppression of household formation. I will only mention (but not describe here) the experience of emigration and economic self-exile that have been the consequences of the GFC by those in the worst-affected countries. In Ireland, Greece, Spain, and other countries those who left their homes and countries of birth did not experience an easy thing. All that was familiar – a mother tongue, customs, social practices, family and kin, and culture were left behind in the hope of finding work and a stable life elsewhere. These are costs that do not readily fall into a spreadsheet or cost-benefit analysis. It is not difficult to see that the net cost of the crisis in human terms is probably incalculable. This is because accompanying the wealth transfer there has been a series of successive geopolitical crises across the United States and Europe involving global socio-economic instability, raising persistent questions about the legitimacy of national governments as well as economic opportunity costs that simply cannot be calculated. What we do know is that the creation and misapplication of these instruments has led to a series of outcomes devastating to the economic stability, autonomy and well-being of hundreds of millions of people. And while claims are made that gross domestic product (GDP) figures show countries are returning to pre-GFC levels, GDP does not measure the human suffering and pain, the erosion of trust, and certainly not the opportunity costs that were incurred by this crisis.

The reality of deficiencies in current economic analysis is that more than ten years after the onset of the GFC economists still cannot provide a precise idea of either how much it cost or what caused it.

Without doubt, the crucial task of making a coherent conclusive measure of losses is fraught with methodological complexities. The case is also a counterfactual. It is one of making a comparison between a world that might have been, a world in which there never was a GFC, and the world in which the crisis actually happened. Furthermore, there is a variety of ways— both quantitative and qualitative— in which the consequences of economic retardation were felt and the global standard of living fell. Following Atkinson and his colleagues we have by their most conservative estimates a \$20,000 per capita loss in the U.S. This number, if extrapolated appropriately to the rest of the world should be sufficient to dismiss any argument that re-regulation or government interference in finance practices would be too costly for the sector or the economy at large to bear. No matter what the costs of implementation, compliance and diversion (from primary financial activities) of regulation, if those regulations were to provide stability and avoid another crisis they would be more than justified. This should be obvious if we take into account the inestimable global non-monetary costs of the current crisis, especially the opportunity costs for generations of people who will suffer impaired economic prospects and reduced standards of living. These indirect and non-economic harms may not be measurable in economic terms, but they are nonetheless real.

There is a larger problem reflected in the preceding description of the deficient state of our crisis epistemology. The larger problem stems from our lack of knowledge about how the GFC was caused and what policies might be best suited to prevent a recurrence. A significant reason why this is crucial is that despite the complexities and uncertainties of the GFC of 2007-09 the next crisis is likely to emerge from causes that are at root very similar if not exactly the same, but will appear at that time to be of an entirely different character. Conventional economic analysis steadfastly suggests that only exogenous factors could cause a failure of markets to self-correct or for either the financial system or the economy as a whole to suffer a disruptive shock. According to market theory it would have to be, in other words, something from outside the working of markets. It



could be unwarranted government interference through regulation or legislative meddling, for example. But the failure is almost certainly likely to be endogenous to the systems of the financial sector. There are two potential sources for an endogenous failure-inducing shock.

One source is that economic agents have a powerful incentive for taking very large profits if they can successfully circumvent, outwit or manipulate any micro-prudential mechanism designed to minimize risk. In the case of the GFC it was the relatively small (compared to the size of the financial system as a whole) sub-prime mortgage lending that triggered a cascading series of events that led to the global crisis. But the multivariate causes that allowed the trigger to set off the crisis lay deep within the malformed structure of the financial system. The sub-prime mortgage market was a sub-unit of a much larger structure, but a crisis only requires one point of failure, such as a particular sub-market. And, if the stability of a whole system rests on trust relationships, it is vulnerable to a malevolent contagion. When the trust evaporates in a sub-market then the whole system can become susceptible to failure as party-counterparty trust relations break down. Regulatory prevention of every specific form of risk practice and rule-defeating technique is impossible. This is so because there are powerful forces driving economic agents to find ways around any regulations or supervision to realize large profits. The root problem is how to ensure the trust relations within the larger financial system and prevent catastrophic harm that follows a failure of trust. This, I will argue, is a moral issue and not one only of technical economic proficiency in market supervision or micro-prudential authority by policy makers.

A second source of endogenous shock is that it is not only risk, as such, that needs to be subject to macro-prudential authority by regulation and supervision. The more important second source is uncertainty. Risk in financial markets as it is commonly understood is measurable and subject to a variety of technical control measures, up to a certain point. Taken as a whole the financial system is unfathomably complex and risk management becomes impossible at that scale. But the risks in

specific markets are becoming better understood and safeguards can be implemented to prevent knowable sources of disruption and shock. Uncertainty, unlike risk, is unknowable and emerges with each cycle of changes in the fluid dynamics of financial systems. The problem here is that uncertainty as an unknown is frequently made visible as the result of something going very wrong. In addition, there are economic agents at work in those systems who find in uncertainties the opportunity for great gain through working against the financial system. They do this by exploiting its vulnerabilities and intentionally creating or finding complexities to use to their advantage and against the public interest. Financial systems are not static. By their nature they are dynamic because they function as a result of interaction of human beings and other systems in functioning financial institutions. If these system participants, both human and non-agential, are unaccountable, if they are impossible to understand in terms of the reasons they have and give for what they do, then holding them responsible for the consequences of their actions becomes impossible as well. These issues raise questions about financial stability and responsibility given the rapid transformation of financial markets by the implementation of artificial intelligence (AI) systems.<sup>71</sup> These AI systems may contribute the next endogenous shock and consequent global crisis and therefore bear a closer look for both the risks and the uncertainties they present. In the next crisis we may well find ourselves asking the same questions about who was responsible as we do in the GFC. Rather than looking for causal agents, however, it may be that AI and other systems will be the focus of our enquiry as they come to play an ever-greater and more obscure role in financial institutions. Our questions will again raise issues of moral addressability and conversability,

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<sup>71</sup>Artificially intelligent systems generally fall into two main categories. One is rules-based, which is relatively simple and constrained to the rules that are programmed into it. The other is neural networks, also sometimes described as deep-learning systems. Deep-learning is a collection of processes enabling distributed machines to generate knowledge from experience. These are computers and software systems that learn from digital data but without explicit programming. Deep-learning systems are used in prediction analysis, text analysis, and image classification and can work with very large-scale unstructured data sets. Specifically in finance, AI based on neural networking are having a major impact on a wide range trading decisions, pattern recognition, fraud detection, portfolio and wealth management as well as the wholesale displacement of repetitive tasks among many other applications. It is sometimes semi-facetiously said of these technologies that if we all were to die, the AIs would go on trading.

but they will be about the systems themselves. We naturally expect that individual human agents give reasons for their intentional acts and omissions; it is not at all yet clear if the same can be expected of non-agential systems. But the question demands our attention as AI-based financial systems rapidly gain importance and increasingly dominate global financial activities.

There are those who argue that AIs are a kind of group agent and as agents they have moral standing. Depending on how they are defined and the essential criteria that are used the debate continues. Again, it is my aim to avoid this argument in metaphysics and consider whether non-agential intentional systems might be better candidates for our concern. The question I come back to is not if we can have groups as agents (Tollefsen 2015), but if we can have systems that are not agents, yet are capable of being held morally responsible on the grounds that they are subject to moral address and meet the requirement of conversability (Pettit 2013).

### **Looking Forward**

Looking forward to the next crisis and what may be its principal causal factors we have to acknowledge that, looking backward, we still do not understand the GFC of 2007-09. We still do not have a good enough understanding of the event-specific causes and factors. The next instance will probably appear to be very different. But rather than concentrating on event-specific causal elements, if it is possible to find underlying systemic causes and factors common to financial crises in general then it may be possible to appropriately assign moral responsibility. To do this, there is a wide array of questions that need to be answered if we are to properly anticipate and possibly even prevent AI-based financial sector involvement in the next major crisis.

The record of progress since 2009 in terms of addressing systemic risks is not encouraging. There are still TBTF financial institutions speculating in derivatives and regulatory oversight is inadequate. In the U.S. there has been no reinstatement of the Glass- Steagall Act or anything resembling it to

separate retail banking from the dangers of wholesale banking. Instead we see a sustained effort on the part of financial sector corporations and governments to roll back existing, limited, inadequate regulations such as Dodd-Frank and to blunt the efforts of regulatory agencies by appointing ministers and secretaries actively opposed to regulation. At the same time, there are reductions in staffing and cuts to resources at the regulatory agencies. While this is happening, there are still incentive programs in place at TBTF banks that generously reward those who engage in risky speculation. And, in the case of Wells-Fargo Corporation, a pattern persists of committing serial fraud absent any apparent sensibility that their systems of incentives continue to cause destruction of trust in essential institutions of financial life. The lack of reform in credit rating agencies is exemplified by the cavalier and negligent deficiencies of Equifax in 2016 by failing to secure their financial records systems against penetration and theft by hackers, something that has exposed millions of people to identity theft and ruined credit ratings.<sup>72</sup>

As AI systems seem destined to become more fully autonomous, their original design and the intentional actions that will initially be programmed into them become central to our moral concerns. It seems safe to assume that AIs will soon come to predominate in the financial sector and further development will follow. This amplifies the need for auditing AI system performance. An essential question is whether non-agential intentional systems in the form of AIs deployed by financial sector corporations can plausibly be made to answer for their intentions and actions when they become self-learning. Non-auditability can mask bad intentions on the part of those who develop and use financial AIs, hence non-auditability is favorable for those trying to avoid

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<sup>72</sup>At least 145.5 million U.S. individuals, approximately 44 per cent of the population, were impacted by this breach. It was caused solely by the failure of the credit rating agency Equifax to take even minimal steps to secure their systems against a well-known vulnerability. And it was one they had been repeatedly warned to patch, which they neglected to do. It is altogether possible that the culpability for this neglect lies with senior management of Equifax. Apparently, they were answering only to the demand for maximization of shareholder value. Hence, any costs incurred in securing their computer systems would have diminished accumulation to the bottom line and thereby depleted share value. This appears to be malignant short-termism at its worst.

accountability. In the financial sector, regulatory efforts cannot compete against ill-intentioned actors who will seek out specific uncertainties, i.e., unknown system vulnerabilities, to exploit them and to mask those exploits. At the same time, regulators cannot anticipate every possible system contingency because the financial system is infinitely complex, dynamic and fluid, creating endless exploitable uncertainties. Given that there are these strong incentives to bring AI into the financial sector especially the reduction of labor costs, providing these same tools to those intent on gaming the system and the potential for financial instability is a very real risk. The costs to society are potentially very high.

In such cases of non-auditable, exploitative AI, who or what will be morally responsible—the corporations that deploy the systems? Or will it be the AIs as they become more fully self-sufficient (superintelligent), autonomous and self-learning?<sup>73</sup> My concern in this study is less with the nature of the causal entities, however, than with the consequences of their action and who (or what) will answer for those consequences.

The near-term potential (and looming) threat, however, lies within shadow banking—there are segments of the financial sector shifting to shadow banking and hidden risk. This is due to the perception that re-regulated financial markets and closely scrutinized financial sector institutions are constrained from recklessness and thus less profitable. What is different about shadow banking that makes us more vulnerable and likely to be victimized are their unregulated and opaque operations. Because they are not subject to scrutiny and oversight to protect the public interest they represent great uncertainty for financial stability. The scope and scale of the instruments and financial volumes are hidden generating greater unknowns with respect to leverage and global risk. In view of the moral hazard at work following the global financial crisis of 2008, the financial sector

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<sup>73</sup>I am using the concept of superintelligence in AI as integrated, non-domain specific machine intelligence, and not narrowly domain-constrained as, for example, computer applications developed only for playing chess, or the simple trading of stocks.

may be driven by demands from investors and principals to continue risky behavior, but it also may be simply impossible to bail out the financial system in the event of a shadow banking crisis due to the volume of the debt involved. There is no question that this would be catastrophic for the world financial system.

The next global financial crisis will in all likelihood be intolerably costly. It is not a matter of if this will occur, but when and how extreme it will be. It also raises the question of how rescuing the financial system, if indeed that is possible, will affect those who will be asked to pay to re-stabilize an essential public good. But beyond the restoration of financial stability and economic security, the loss of trust in essential financial institutions that was experienced in the GFC of 2007-2008 is not only a crucial public policy matter, but a central moral issue. I have proposed a practical approach to addressing these questions through conceptualizing corporations as non-agential intentional systems and treating them as members with moral standing in the moral community. The weight of legal, social and moral judgements may in combination sustain a normative environment in which financial sector corporations will again serve democratic values and the common good rather than only their own private interests. Doing nothing is not an option.

## APPENDIX

### **Case Study of Sub-Prime Fraud, Intentional Victimization and Moral Responsibility**

The case study of this thesis is about sub-prime mortgage fraud. Because it is a very complex topic and one that is technically difficult I want to put the financial instruments and processes into simple terms that illuminate the philosophical problem of intentional and foreseeable harmful corporate action without having it overwhelm the whole project. This requires that setting out the case study remain a largely, if not exclusively, descriptive exercise.

A vast number of books and articles have addressed the causes and consequences of the global financial crisis of 2008. Those publications range from the highly technical to the highly popular and provide a broad qualitative spectrum of views and explanations for what happened. Michael Lewis' *The Big Short: Inside the Doomsday Machine* (Lewis 2010) has been one of the most popular owing to Lewis's journalistic skill and ability to tell a superficially highly engaging story. Consequently, there are many reviews, again of varying quality, that provide an introduction to and overview of *The Big Short*. Therefore, I will not revisit the basics here. I assume anyone reading this has a grasp of the narrative that Lewis offers. What I want to do is indicate some problems, oversights and misleading elements in this book as they pertain to the issues of the financial sector and corporate moral responsibility in this thesis.

Lewis's treatment is also alleged by wide popular consensus in the media to be an accepted narrative or standard story of the crisis, one that is informative and authoritative about the sources and mechanisms leading to the GFC of 2008. The outcome of the crisis continues to afflict global socio-economics more than a decade later with persistently slow global growth and threatens to do so far into the future. Because Lewis's misleading portrayal is a standard story it invites scrutiny. My aim is to raise some questions about claims within what has become the official popular narrative

about the global financial crisis and its putative causes. Some of these claims are easily dismissed. Others are stubbornly difficult and need to be scrutinized closely as they will inform and substantiate the claim that financial sector corporations can be held morally responsible for their intentional actions.

One thing should be obvious – we need to understand with some precision and rigor what happened and who and what caused it because we probably cannot endure another global financial disaster. Setting aside yet another debunking of the long-discredited, simplistic assertions that it was all explained as the fault of feckless borrowers who took on loans they couldn't afford or that it was merely the government forcing banks to offer loans they didn't want to make and similar diversions from a more rigorous examination, I will focus on some essentials to demonstrate the intentional nature of the deception perpetrated by the financial institutions and their participants.

There is a sustained effort by certain parties to create a particular interpretation of how we understand the causes of the global financial crisis and how we direct our reactions toward those involved. One element of that interpretation is in managing the portrayal of the history of the crisis. This involves constructing a misleading story line or false narrative of the actual sequence of events that seems not only plausible, but also serves to convince those not interested in enquiring deeply into what happened or a close examination of the claims, assumptions and assertions involved. The other element is to redirect blame away from those individual and collective agents who, in a complex mixture of greed, hubris, fraud, betrayal of trust, incompetence and ignorance took action resulting in what remains an ongoing global crisis. With a more critical view, can we neutralize those distractions and get a more precise, more rigorous understanding of the reality and hope to prevent a recurrence?

### **A Brief Review of Short-Selling and the Subprime Crisis**



It is not necessary here to review the complete history leading up to sub-prime fraud of the early 2000s and the ensuing global financial crisis. I will briefly focus on the immediate causes to provide context for criticism. This case study does not examine the long historical trajectory from say, Bretton Woods (1944), or even earlier.

Short-selling lies at the heart of the sub-prime mortgage crisis and it is there that I will focus my attention to detail the intentional collective action taken by financial sector corporations leading to the global financial crisis. Short-selling—at its simplest—is making a bet that a security (a tradable financial asset) is going to fall in price. It involves the use of financial instruments to bet against other instruments that are expected to decline in value or go into default due to failures of the underlying collateral that supports the instrument's value. If the short-seller has good information that the security in question is going to decline it is possible to make significant gains on the bet against the less knowledgeable holder of the security.

In the case of the sub-prime mortgage crisis those who took short positions on the mortgage bonds issued by the large investment banks were not moral heroes betting against evil institutions as in *The Big Short*; they were agents complicit in the problem and created the instruments that drove the engine of doom toward crisis. One thing we must know is how did the short-sellers drive the engine of doom? This involves a cast of characters. The *dramatis personae* included mortgage lenders, banks that package mortgage loans into bonds, banks that re-package bonds into financial derivatives called collateralized debt obligations (CDOs), and the ratings agencies (Fitch, Moody's, Standard and Poors) that certify and approve each stage of the process. The remaining members of the cast are the borrowers – the homeowners (primarily Americans, but also others throughout the developed economies) who would ultimately lose their homes, jobs, pensions, middle-class lives, health and well-being in the process of default and collapse.

Default risk is a constant in banking; it is the risk that a borrower cannot repay a loan. Banks found a

way to make a financial product out of default risk that could be sold to other investors at a plausible price. The proximate cause of the global financial crisis of 2008 was the origination and sale of a form of financial instrument by JP Morgan, the investment bank, called a credit derivative that was designed to advantageously exploit default risk. These instruments were variously rated with labels such as “triple A” (indicating the lowest risk of default) or “BBB” (significantly greater risk) by the credit ratings agencies (Standard & Poors, and others) and sold by financial sector firms to investors as if those debt instruments were comprised of a certain quality of secure obligation. In fact, the instruments (the securities) were typically derived (hence the name) from a mixture of some with high quality and some with much lower quality debt having a higher probability of the underlying collateral at risk of default. This is deception. The ratings indicated higher quality and safety than was true of the securities. The cleansing mixture of high and low-quality securities laundered the bonds that were created from these, making those bonds appear better than they were. Laundering of sub-prime risk was the whole point of the CDO as a financial instrument and the parties intentionally made the CDOs look safe when they were known not to be. This is a form of fraud because it intentionally misidentifies the scale of the underlying risk to the investor.

Mortgage bonds are sold in fixed income markets. This is because the flow of funds is fixed on a monthly or quarterly schedule, or some other regular underlying pattern of payment that acts as collateral. Anything forming a contractual debt with a revenue stream (comprising monthly payments) can be pooled and securitized. For example, student loans, car loans, credit card payments, gym memberships, or even non-debt assets such as subscriptions for services or access to information are eligible as long as they generate receivables (usually in the form of regular payments). In the case of sub-prime mortgage fraud, when the underlying collateral of the securities (e.g., in this case the collateral is a flow of monthly mortgage payments) failed due to late payments and defaults by insolvent or impoverished mortgage purchasers then the bonds (the

securitized instruments) failed as well.

In the US the failure of the housing market was in large measure due to the adjustable rate mortgages (ARMs) that were offered with low teaser rates of interest to credulous buyers, with the low rates lasting typically for only two years. When the teaser rates expired and the interest rate jumped the buyers suddenly found themselves unable to meet their obligation to pay. The result, spread over a huge number of defaulting borrowers, crashed the sub-prime mortgage bond market setting off a crisis of insolvency among all the parties and counter-parties involved in the origination, proliferation and redemption of the securities. When the crisis came, it rapidly spread around the world. The resulting contagion effect dispersed throughout the global financial system threatening to bring down the whole decadent structure. Due to the globally electronically interconnected nature of the financial system and its institutions, the crisis propagated swiftly, and in the aftermath damaged and in some cases destroyed lives, families, communities, jobs, pensions, house prices, industries, and most importantly, trust in essential institutions.

To further explain the mechanism a sketch of short-selling and the essential mechanism of credit default swaps (CDSs) can be shown to act as fuel for CDOs. These are the sources that amplified the risk taken by the large financial institutions leading to the crisis. The relationship among origination of CDOs, shorting with CDSs and the ratings agencies made them all complicit in the fraud. It is not hard to see that the subprime mortgage CDOs were toxic in the form of bond issues and that they were sure to fail due to the poor quality of the underlying credit-worthiness and high default risk of the borrowers. Yet there was a huge and endless appetite for these in the financial sector despite the transparency of the faulty instruments for those willing to understand them. But the strategy for the banks selling these instruments in the period leading to the global financial crisis was how to produce more CDOs. By selling off the risk to others and creating yet more to be sold this worked because the rating agencies continued to make toxic bonds look credit-worthy. This relieved a bank

making the loan of any concern with the quality of the borrowers.

CDSs are best thought of simply as an insurance policy. CDSs allowed banks to swap their loan risk to other investors, making finance safer and freeing the banks to offer yet more credit. To purchase a CDS is to bet that something is going to fail and if it does the holder of the CDS gets paid for the failure. Purchasers of CDSs pay an annual premium for them just as with any insurance. That is their cost. But the pay-off can be many multiples of the premium – tens, hundreds or thousands of times. This insurance in the subprime mortgages loan fraud is a wager against what is sure to default (fail). In this case purchases of CDSs as a form of short-selling is to work for, not against, the toxicity of the faulty mortgage bonds. Shorting here is betting against the large banks who were selling the bonds to gullible investors as well as the issuers of the CDSs. These institutions were relying on the main assumption for continuing to sell CDOs, mortgage loans and insurance against default (CDSs) – that there had never been substantial defaults on housing loans. This is the familiar gamblers' fallacy of using the statistically meaningless past to make predictions about the future. These were the mechanisms and techniques of systemic crisis and operated to make the crisis infinitely worse.

Imagine a CDO composed of bonds made up from AAA rated mortgages. It is shaped like a tower, with the highest-risk, lowest quality bonds at the bottom tranche (a tranche is a level or slice of the tower). The upper levels are composed of bonds of increasingly higher quality. Now compare an ordinary CDO made up of bonds of sub-prime mortgages, pooled together with the underlying collateral conceived of as the payments on the mortgages made each month. The security of this financial instrument is formed from the assurance that the mortgage holder will make the payment to avoid losing the house to foreclosure for failure to pay the monthly debt.

The floors or levels of the structure of a CDO, called the tranches, can be made salable. Each floor, or tranche, represents a collection of mortgages rated at a certain level of risk. A CDO can have a number of floors, some of which are the lowest quality (BBB) at the bottom (called the mezzanine

level) and some of the highest quality (AAA) at the top as well as numerous floors in between with a variety of ratings. A mezzanine CDO is composed of sub-prime mortgage bonds rated BBB. A CDO composed of the lowest quality, riskiest mortgages was a structured finance CDO, but intentionally not referred to as a sub-prime-backed CDO for reasons of buyer perception. In mezzanine CDOs, tranches of these worked to toxify the bonds and make the whole structure vulnerable to small percentage failures within certain classes of CDOs.

By gathering all the BBB mortgage loan CDOs from towers #1 and #2 into a third structure of only BBB rated CDOs the originators submitted these to the rating agencies who would then rate them as, for example, 80

New home loans were generated to meet the demand for CDOs which were then sold on to investors. Thus, loan money flowed to home buyers who paid sellers (loan generators). The supply of loans continued to grow and serve as raw material for the bonds. But there weren't enough low credit score Americans taking loans to generate the necessary demand to satisfy the appetite of the investors. Investors demanded more and more loans be made available as investment opportunities.

The increasing demand for products produced purchases of CDSs (recall that the short sellers buy CDSs as insurance against the deficient bonds (CDOs)). But there were not enough CDOs being generated so the production process changed to the synthetic output of CDOs made of CDSs; the more synthetic CDOs, the more there were (through replication) for the sellers (JP Morgan, Morgan Stanley, Goldman Sachs, Deutschebank, and other investment banks) to offer to investors of the ersatz, synthetic CDOs in the absence of sufficient numbers of sub-prime loans of actual houses. This generated a separate market in CDSs specifically as insurance against synthetic CDOs (those that were made up of CDSs).

This led to the creation of a market in synthetic CDOs – these are CDOs with CDSs inside the bonds; they are bonds made up of CDSs, which are not mortgage-backed, but made up of the insurance contracts based on the probability that the underlying bonds will fail. The counterpart to the mezzanine CDO described above is the synthetic CDO composed of CDSs on BBB CDOs. When a CDO is composed of a mix of variously rated bonds, the most expensive CDS that can be bought is based on the highest risk bonds in the CDO that is being insured by the CDS. Thus, the premium to be paid, as with any insurance policy, is set by the riskiest mortgages in the bond made from the collection of mortgages. But if the CDS insurance cost is based on the lower-risk components in the bond, then the premium is lower, making it a more attractive instrument, but one that pays off just as if it were based on the most-likely to fail components. Together ordinary CDOs and synthetic CDOs are the Engine of Doom, hence the subtitle of Lewis's book. They were certain to bring the financial system into crisis and to require a rescue that could only be effected by governments due to the size and scope of the crisis. This explains why there were so many losses, far in excess of the number of sub-prime loans to unqualified buyers and borrowers of whom there were far too few to have brought down the global financial system.

Compare this with earlier purchases of CDSs as insurance against sub-prime mortgage CDOs. The game had now changed such that the short-seller and the seller of deceptively rated bonds are both on the same side of the trades. Thus, more CDSs means more synthetic CDOs which means more synthetics sold to investors at higher levels of risk leading to more CDSs to cover the synthetic CDS risk. Again, those on the other side of the bets were actually in the same game (on the same side) as the short-sellers.

When this finally and inevitably failed, the rescue of the financial sector was a historically unprecedented taking of public resources (in monetary terms) to save the systemically important financial institutions (now known as "sifis"), and also referred to informally as "Too Big To Fail"

(TBTF) and to save the capital markets from their own hubris and incompetence. Accompanying this pillaging of public resources and instantiation of prolonged national fiscal consolidation (austerity) programs to protect the most vulnerable banks there have been persistent efforts to change the dominant narrative of these events. The aim is to obscure the possibility of any ascription of culpability to the principal agents. However, in Lewis's view the short-sellers were heroes and personalities, not villains. This is not a credible interpretation of the facts of the case and leaves the social order vulnerable to future threats of the same kind.

I have tried to describe the intentional mechanisms of sub-prime mortgage fraud above because to understand the threat of intentional financial victimization it is necessary to know something about how it works. Consumer finance aims to cheat the poor. The poor in this instance are not just financially or economically poor, but poor in economic understanding, poorly financially educated, those experientially disadvantaged and desperate with respect to their status and social standing. These are all among the poor being cheated. But we must also know that this of course includes those in the financial sector who sought to benefit from what they could not take the trouble to understand, especially with respect to the risks and the consequences of derivatives and how they were misused. The claim is made that nobody in the credit markets understood what was happening in the housing bubble created by fraudulent sup-prime mortgage lending. This is not true. But in Lewis's story, the short-selling heroes are the only exception. This is misleading. But exploring this would have greatly complicated Lewis's reporting and propagation of the standard story. There remains an essential but unanswered question – many people in the credit markets were aware of the growing risks, but why does Lewis, among so many others, ignore what was known, and by whom, about the systemic risks and what might have been done to avoid the resulting global crash?

### **Blame Shifting**

Who was not at fault for the financial crisis? The global financial crisis was not caused by US low-income borrowers. The housing bubble was global, not local, and collapsed globally not just locally in the US. This is why the fault cannot be attributed solely to US borrowers of no money down loans. There simply weren't enough of them to cause a global crash. And those who want to blame the US Community Reinvestment Act (CRA) (1977) have to acknowledge the evidence which shows where the US housing bust did occur and it was in the suburbs, not in the CRA areas. Neither was the global financial crisis caused by GSEs (Government Sponsored Enterprises, e.g., Freddie Mac and Fannie Mae). Empirically, underwriting of sub-prime mortgages was mostly by private non-banking firms, not GSEs, and not by regulated depository banks. Thus, it wasn't the government that primarily caused the crisis.

In an aberrant housing-centric view of the macroeconomy, it has even been claimed that it was the Federal Reserve tightening of monetary policy in 2008 that caused the global financial crisis. This bizarre alternative view argues that because the housing bust actually started in 2006 with evidence of declines in housing activity the Fed should have managed interest rates better. But this would have been ineffectual because loosening of rates would not have addressed the action of the investment banks and their faulty financial products. David Beckworth and Ramesh Ponnuru offered this cause and effect explanation in a 27 Jan 2016 New York Times Opinion piece titled "Sub-prime Reasoning on Housing" (Beckworth and Ponnuru 2016). In this scenario, the perpetrators were unregulated private mortgage origination firms working as private securitizers who were exempt from lending standards. These originators created and bundled low- and no-quality loans into securities mixed with other higher-rated collateral and the securities were sold as AAA bonds both to the naïvely credulous and those who knew better but were willing to overlook everything in the pursuit of short-term gains.

### **Concluding Remarks on the Case Study**



I have tried to show in this section that financial sector corporations are a salient case study for this project for the following reasons: their acts are not only deliberate and aimed at specific outcomes, but their actions produce negative consequences that affect individuals as well as communities. They are capable of victimizing by harming and injuring individuals and communities without regard for financial stability, the consequences for their victims or what it will cost to restore financial and social order. Victimization then causes resentment and harshly negative attitudes among those vulnerable to financial sector corporate actions and demands for moral judgements follow from this. In the sub-prime mortgage fraud episode there was conscious knowledge both among corporate individuals and as standard practice within the financial sector organizations that intentional actions were being taken to defraud, deceive and mislead consumers of these financial products.

It was also not unforeseen what the consequences would be for the financial system when the structure of derivatives collapsed. Far from no one seeing what was coming, it was a matter of individual and collective agents being captured by short-termism that allowed these intentionally deceptive practices to continue. Since the global financial crisis that followed there have been many books and commentaries about the causes of the global financial crisis. Lewis's story, a massively influential best-seller, is entertaining and instructive, but ultimately it is misleading because its primary aim is mass market entertainment, and not a thoroughgoing critical analysis of a serious socio-economic and philosophical problem caused by intentional corporate action. His morally simplistic story is about personalities ("good guys versus bad guys") of individual short-sellers rather than systemic failure and the consequences for the commons issuing from a financial industry which is now essential to modern life globally.

The case study is an illustration of systemic intentional manipulation of a segment of financial system investment in financial products known to be of low creditworthiness, unsustainable and

systemically dangerous and destabilizing. The long-term consequences have been devastating. There has been a crucial loss of trust in financial institutions, an extended period of only partial recovery from market failure, and the world came close to a global financial collapse. The short-term consequences have been no less serious. There were multiple bailouts, punishing austerity for sovereignties involving contentious macroeconomic policies (fiscal consolidation) when private debt became sovereign debt, as well as prolonged, depressed economic conditions for the global economy, and loss of jobs, pensions, homes, and individual and business bankruptcies. Austerity policies that suppress economic activity but protect financial sector institutions from the consequences of debt lowered growth rates because a loss of tax revenues diminished GDP gains, acted as a drag on employment growth, and led to secular stagnation.

From Michael Lewis's book and those like it we are aware of the apparent causes for the financial crisis, but as I have tried to show there are deeper concerns to be considered. When we ask "How did this happen?", we see that regulatory capture by financial sector corporations is only one part of the problem. When we consider the responsibilities borne by corporations, experience has taught that sanction regimes must be obligatory because compliance cannot be assured if they are voluntary. This is the same idea as with self-regulating markets generally. The idea rests on fallacious assumptions and bitter experience. As to the credibility of government sanctioning mechanisms it appears that governments have no credibility, there are no alternatives except massive public pressures. When we ask why so little has been done to fix this broken system we confront the belief system of non-interference in markets with respect to laissez-faire. This is complemented by the reality that the response to the global financial crisis was barely sufficient and a more radical remedy was successfully avoided.

There is also the ascendance of the financial system over the social system that is a pernicious inversion of socio-economic priorities. Private interests are powerful and well-organized and they

are highly focused on their self-interests. Financial secrecy and the specialized language of finance makes accessibility nearly impossible for non-specialists. Furthermore, there are various forms of concealment including tax havens, tax inversions and secrecy that hide corporate wrongful action behind the curtain of trade secrets and proprietary information. A lack of transparency is enabled by private interests operating in the opacity of legal regimes that protect them from scrutiny. Finally there is competition among sovereignties for hosting corporate headquarters and tolerance for risky financial economic action through tax arbitrage, labor arbitrage and legal jurisdiction shopping. Freedom of mobility for capital (through off-shoring and out-sourcing of finance), but not for anyone else leads to corporate immunity and loss of accountability. This makes it impossible to hold financial multinationals to account for their actions. Structural, regulatory and fiscal reforms have been deferred or avoided altogether but remain essential for genuine financial stability. Under these circumstances the prospects for financial security and economic stability indicate that things are getting worse, not better.

This case study is meant to help illustrate one primary goal – that people collectively deserve and require financial and economic stability to be able to have flourishing lives despite the power and influence of private interests. However, things seem to be worse following the global financial crisis because of political fragmentation among states that are systemically fragile and there is a lack of adequate public regulatory authority at the international level to address corporate action with appropriate and effective sanctions. There is as yet no way to organize and implement a global authority for consistent, effective regulation and control. This is due primarily, but not exclusively, to a lack of effective regulation at the national level, but with daunting international complications. The financial system is working, but only for the few. For the rest it creates repeated crises for which they, the rest, are compelled to pay in various ways. This is leading to a profound loss of trust, a sense of curious freedom for some, but uncertainty, insecurity, and unfreedom for all the others.

In summary, the case study contributes to explaining and answering the important philosophical question of assigning moral responsibility to corporations. Financial sector corporations are a good case study for this project because as I have tried to show, they act intentionally, their intentional actions led to consequences for individuals and communities, the consequences can victimize by harming and injuring individuals and communities, these cause reactive attitudes among the victims of corporate actions and moral judgements follow.

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